MUNICIPAL LIABILITY UNDER 42 U.S.C. 1983

HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 584, S. 585, and S. 990

MUNICIPAL LIABILITY UNDER 42 U.S.C. 1983

MAY 6, 7, JULY 8, AND 23, 1981

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[97th Congress]

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MUNICIPAL LIABILITY UNDER 42 U.S.C. 1983

WEDNESDAY, MAY 6, 1981

U.S. Senate,
Subcommittee on the Constitution,
Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:20 p.m., in room 2228, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Thurmond and Grassley.

Staff present: Steve Markman, general counsel; Peter Ormsby, professional staff member; and Kim Beal, assistant clerk.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, AND CHAIRMAN OF THE SUBCOMMITTEE ON THE CONSTITUTION

Senator Hatch. We will open this hearing of the Judiciary Subcommittee on the Constitution.

I apologize, to begin with, for being late. I am chairman of the Labor and Human Resources Committee—the full committee—and we have just been marking up six bills. We started at 9 o'clock this morning, and all amendments were hotly contested. We reported five of the six out, and the sixth one we failed to report on a vote to 8-8. So you can see that when I say things are hotly contested they really are. We just finished that committee markup, and it went longer than we thought it would go.

The purpose of this hearing is to consider the extent of municipal liability under the Civil Rights Act of 1971, now 42 U.S.C. 1983. The Civil Rights Act of 1971 has been extremely important in providing a remedy for individuals whose constitutional or civil rights have been violated under the color of State law.

At the outset of these hearings, I want to reiterate my strong commitment to the enforcement of the constitutional rights of all citizens.

However, I do feel that litigation under section 1983 has evolved in some ways to the strong detriment of State and local governments while doing little or nothing to further individual constitutional or civil rights.

Even a cursory observation reveals that many of our cities find themselves in precarious financial situations. I have received a great deal of bipartisan support for my bills, S. 584 and S. 585, from State and local government officials who claim that section 1983 litigation is creating an increasing drain on their treasuries and lessening their ability to serve the public. During the course of these hearings, we will hear testimony regarding the burden that section 1983 litigation is placing on these municipalities.

The Civil Rights Act of 1971 was passed during the post-Civil War reconstruction era to protect newly freed blacks from violations of rights secured by the "Constitution and laws." The act was specifically designed to counter the activities of the Ku Klux Klan and was formerly referred to as the Ku Klux Klan Act.

Two years ago, in *Monell* v. *New York Department of Social Services,* at 436 U.S. 658—a 1978 case—the Court overruled a nearly two-decade-old precedent that local government units could not be held liable in damages for violation by their employees of a person's civil or constitutional rights.

I believe that municipalities are proper defendants in section 1983 cases, and I do not wish to see a return to the pre-Monell status of municipal immunity, but recent Supreme Court interpretations combined with the effect of the Civil Rights Attorney's Fees Awards Act of 1976 have created a situation in which municipalities are burdened with section 1983 litigation in ways which I feel are not justified by important policy considerations.

Last summer, in *Maine* v. *Thiboutot,* the Supreme Court interpreted the "and laws" language in section 1983 to mean that local governments were liable for violations of any Federal laws. Although the ultimate impact of this decision cannot be fully determined, I cannot believe that the 42d Congress, in passing the Ku Klux Klan Act, intended to make municipalities liable for Federal statutes such as the Federal Insecticide, Fungicide, and Rodenticide Act; the Federal Noxious Weed Act of 1974; and the Wild Free-Roaming Horses and Burros Act. I feel that S. 584 would solve many of the problems created in the *Thiboutot* decision.

During the hearings, we will consider whether exceptions should be made in S. 584 to make municipalities liable, at least for equitable relief, for statutes aiding impoverished individuals such as the Social Security Act.

In *Owen* v. *City of Independence,* the Court ruled that cities shall not have a "good faith" defense in section 1983 actions. This means that local governments are liable for violations of constitutional law which have not been decided yet. S. 585 would provide cities with a "good faith" defense in section 1983 actions.

The subcommittee will also want to consider the implications of *Owen* on local governments and whether language should be added to S. 585 to provide equitable relief in such cases.

I believe that section 1983 litigation is increasingly immobilizing our municipalities. The evolution of section 1983 has occurred with little congressional response. These important hearings will consider the status of section 1983 litigation, including policy considerations which the Supreme Court has neglected in its recent interpretations, and possible approaches to ease the burden on State and local governments while insuring the important rights of individuals.

[S.584 and S. 585 as introduced by Senator Hatch and S. 990 introduced by Senator Mathias follow:]

97TH CONGRESS
1ST SESSION

S. 584

To amend section 1979 of the Revised Statutes (42 U.S.C. 1983), relating to civil actions for the deprivation of rights, to limit the applicability of that statute to laws relating to equal rights.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 26 (legislative day, FEBRUARY 16), 1981

Mr. HATCH introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend section 1979 of the Revised Statutes (42 U.S.C. 1983), relating to civil actions for the deprivation of rights, to limit the applicability of that statute to laws relating to equal rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1979 of the Revised Statutes (42 U.S.C. 1983) is amended by striking out "and laws" and inserting in lieu thereof the following: "and by any law providing for equal rights of citizens or of all persons within the jurisdiction of the United States".

97TH CONGRESS
1ST SESSION

S. 585

To provide a special defense to the liability of political subdivisions of States under section 1979 of the Revised Statutes (42 U.S.C. 1983) relating to civil actions for the deprivation of rights.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 26 (legislative day, FEBRUARY 16), 1981

Mr. HATCH introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To provide a special defense to the liability of political subdivisions of States under section 1979 of the Revised Statutes (42 U.S.C. 1983) relating to civil actions for the deprivation of rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1979 of the Revised Statutes (42 U.S.C. 1983) is amended by inserting "(a)" before "Every" and by adding at the end thereof the following new subsection:

"(b) No civil action may be brought against a political subdivision of a State under this section if the political subdivision acted in good faith with a reasonable belief that the actions of the political subdivision were not in violation of any rights, privileges, or immunities secured by the Constitution or by laws providing for equal rights of citizens or persons.".

II

96TH CONGRESS
1ST SESSION

S. 990

To amend section 1979 of the Revised Statutes to provide that States, municipalities, and agencies or units of government thereof, may be sued under the provisions of such section; to establish rules of liability with respect to such States, municipalities, and agencies or units of government thereof; and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 10 (legislative day, FEBRUARY 16), 1981

Mr. MATHIAS introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend section 1979 of the Revised Statutes to provide that States, municipalities, and agencies or units of government thereof, may be sued under the provisions of such section; to establish rules of liability with respect to such States, municipalities, and agencies or units of government thereof; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Improvements Act of 1981".

SEC. 2. Section 1979 of the Revised Statutes (42 U.S.C. 1983) is amended to read as follows:

(1) by inserting "(a)" immediately before "Every"; and

(2) by adding at the end thereof the following new subsections:

"(b) For purposes of this section, 'person' means any natural person, any association or combination of natural persons, any partnership, corporation, or other legal entity, any State or territory, any municipality, county, parish or other State, territorial, or local governmental subdivision, unit, or agency, the District of Columbia, or any agency of the District of Columbia; and 'State or territory' shall include the District of Columbia.

"(c) A State, municipality, or any unit of government or agency thereof shall be liable for the conduct actionable under paragraph (a) of this section of any officer, employee, or agent of, or other person clothed with the authority of, such State, municipality, or unit of government or agency thereof, when—

"(1) for purposes of damages or other monetary relief—

"(A) the conduct was authorized or required by a statute, ordinance, policy, or practice of the entity, unit, or agency, or was undertaken by a person or persons appointed or elected to make such policy;

"(B) the officer, employee, agent, or other person clothed with the authority of the entity, unit, or agency engaged in such conduct at the direction or with the encouragement of a supervisory officer;

"(C) a supervisory officer, with the authority to act, knew or should have known that an inferior officer, employee, agent, or other person clothed with the authority of the entity had previously engaged in such conduct or similar conduct and failed either to halt such conduct or to take reasonable steps to prevent the recurrence of such conduct;

"(D) one or more officers, employees, agents, or other persons clothed with the authority of the entity, unit, or agency, engaged in such conduct and the person seeking relief under this Act cannot by reasonable effort identify such officer, employee, agent, or other person or prove causation with respect to a particular officer, employee, agent, or other person clothed with such authority;

"(2) for purposes of injunctive or declaratory relief the officer, employee, agent, or other person clothed with the authority of the entity, unit, or agency engages in such conduct. The court shall direct the State, the State municipality, or any unit or agency thereof, to adopt whatever disciplinary or other remedial measures are necessary to prevent the recurrence of such conduct, or, when otherwise appropriate.

"(d)(1) In suits against an entity, unit, or agency pursuant to subsection (c), it shall not be a defense for such entity, unit, or agency that the officer, employee, agent, or person clothed with the authority of the entity, unit, or agency, is personally immune from liability under this Act because of the existence of a common law or statutory immunity attaching to such officer.

"(2) Supervisory officers having command responsibility superior to any person engaging in conduct actionable under this Act, shall be jointly and severally liable with such persons whenever under subsection (c) of this Act the State, municipality, or unit or agency thereof, would be liable.

"(3) A plaintiff may join to a claim under this Act any other claim or claims arising under the laws of any State, territory, the District of Columbia, or of the United States, against the same defendant, additional defendants, or both, if the latter claim or claims and any one claim under this Act derive from a common nucleus of operative fact; and a court of the United States shall proceed to hear all such claims, as well as any additional claims under this Act that may be joined in the action.

"(e)(1) In any action brought under this Act, a court of the United States may certify to the highest court of a State a question of State law if—

"(A) the State has established a procedure by which its highest court may answer questions certified from such court of the United States;

"(B) the question of State law may be controlling in the action and cannot be satisfactorily determined in the light of the State authorities; and

"(C) the court expressly finds that certification will not cause undue delay or be prejudicial to the parties. Except as provided in this subsection, no court of the United States shall stay or dismiss any action under this Act for the purpose of obtaining a decision as to the law of the State from a State court.

"(2) No court of the United States shall stay or dismiss any civil action brought under this Act on the ground that the party bringing such action failed to exhaust the remedies available in the courts or the administrative agencies of any State, territory, or the District of Columbia, or subdivisions, units, or agencies thereof.

"(3) In the absence of extraordinary circumstances, no court of the United States shall enjoin a pending criminal prosecution under the law of any State, territory, subdivision of any State or territory, or the District of Columbia, if such prosecution—

"(A) was commenced prior to the time of filing of the action in the court of the United States;

"(B) is maintained against the party who brings the action in the court of the United States or against a person who is in privity with such party; and

"(C) provides a full and fair opportunity for the presentation and resolution in the courts of such State, territory, subdivision thereof, or the District of Columbia, of every claim of deprivation presented in the action in the court of the United States.

For purposes of this subsection, 'extraordinary circumstances' include but are not limited to the existence of a criminal prosecution commenced or maintained in bad faith or to enforce a statute, ordinance, or regulation, that is, in whole or in part, facially unconstitutional.

"(4) In an action brought under this Act, a court of the United States may enjoin a pending criminal prosecution under the law of any State, territory, subdivision of any State or territory, or the District of Columbia, that was commenced subsequent to the time of filing of the action in the court of the United States, and shall enjoin such prosecution if it finds that the prosecution was initiated in response to a suit under this Act.

"(5) In an action brought under this Act, a court of the United States may enjoin a proceeding in the courts of any State, territory, subdivision of any State or territory, or the District of Columbia, which is noncriminal in nature, even if such proceeding is in aid of and closely related to the enforcement of a criminal statute, ordinance, or regulation, irrespective of whether the proceeding was commenced prior to or subsequent to the action.

"(f) In an action brought under this Act, the prior judgment of a court of any State, territory, subdivision of a State or territory, or the District of Columbia, shall be given merger and bar effect, and no other effect, as against any claim presented by a plaintiff in an action in a court of the United States, but such effect shall be given to that prior judgment only if it—

"(1) was rendered on the merits of the same claim,

"(2) following a full and fair hearing,

"(3) in an action commenced by the present plaintiff:

Provided, however, That when a court of the United States hears a claim not so barred it shall not grant as relief the modification or setting aside of any judicial order with respect to damages, irrespective of whether the order has been executed.

"(g)(1) Every civil action commenced under this Act shall be barred unless the complaint is filed within four years after the right of action first accrues. The action of any person under legal disability or outside the United States at the time the claim accrues may be commenced within three years after the disability ceases. Any time utilized seeking relief through State remedies shall not be counted in determining the time within which the complaint must be filed.

"(2) If any person having a cause of action under this Act dies after the accrual of his claim, the legal representatives of the deceased shall have such action therefor and may recover damages (to be distributed in accordance with the law of the State in which the deceased resided) for the benefit of the next of kin of the deceased or if there be no next of kin for the benefit of the estate to be disposed of in accordance with the law of the State in which the deceased resided.".

SEC. 3. Nothing contained in this Act shall be construed to constrict the availability of relief under any other provision of Federal law or impair the availability of any other remedy for denials of any rights, privileges, or immunities secured by the Constitution or laws of the United States in the courts of the United States or of any State, territory, subdivision thereof, or the District of Columbia.

SEC. 4. In evaluating the need for relief under this Act, no court of the United States shall consider the availability of a remedy under the laws, ordinances, or regulations of any State, territory, subdivision thereof, or the District of Columbia.

SEC. 5. This Act shall apply in any action arising as a result of any deprivation of any rights, privileges, or immunities secured by the Constitution or laws of the United States—

(a) with respect to the amendments made by section 2 (b) through (f) of this Act, to any deprivation occurring after the date of enactment, and

(b) with respect to the remaining amendments herein made, to any action pending on the date of enactment of this Act and to any action subsequently brought.

Senator **Hatch**. Senator Thurmond?

Senator **Thurmond**. Thank you, Mr. Chairman

Mr. Chairman, I am in another committee meeting, and I would ask unanimous consent that my statement on this subject, with attachments, be placed in the record.

Senator **Hatch**. Without objection, it is so ordered.

OPENING STATEMENT OF HON. STROM THURMOND A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA, AND CHAIRMAN OF THE COMMITTEE ON THE JUDICIARY

Mr. Chairman, I commend the subcommittee, and you especially, for holding these hearings on legislation concerning the liability of political subdivisions and their employees under section 1983 of the civil rights laws.

As the chairman knows, the court decisions in this area have gradually eroded away the good faith defense of public officials to a point where the courts are being flooded with so-called 1983 actions. These lawsuits are being filed against not only law enforcement personnel acting in the line of duty, but all manner of State and municipal employees who are carrying out their responsibilities as public servants.

This is a problem in my State of South Carolina. Earlier this year, I received a letter from Mr. Roy D. Bates, the city attorney of Columbia, our State's capital, indicating his grave concern about the denial of a good faith defense to municipal defendants under the recent Supreme Court decision of *Owen* v. *Independence.*

Mr. Bates points out in his letter, which I ask unanimous consent to be printed following my remarks, that it makes no sense for municipal employees to be precluded from making a good faith defense for carrying out their duties. This situation is reaching a serious point for all public bodies which are now being required to carry insurance at great cost in order to operate their government. For many small jurisdictions these costs can be far beyond their ability to meet them.

Mr. Chairman, two bills, S. 584 and S. 585, are presently before the subcommittee. Mr. Bates also included a draft measure that I would like the subcommittee to study closely in regard to this problem. There is no question in my mind that some legislative action is required in this area.

It is my understanding that the courts are also concerned about the numbers of cases being filed in this area and that in many courts backlogs are being expereienced because of these 1983 suits. It is important that we act in order to reduce the court backlog of these types of lawsuits.

I hope these hearings will bring out the extent and nature of this problem and that the subcommittee will be able to provide a change in the laws that will allow State and local public officials to carry out their responsibilities in good faith in a manner free from the unnecessary threat of a law suit and personal liability.

[The letter follows:]

FEB 4 1981

CITY OF COLUMBIA
SOUTH CAROLINA
OFFICE OF THE CITY ATTORNEY / CITY HALL / POST OFFICE BOX 147 / COLUMBIA, S.C. 29217 / (803) 733-8247

January 22, 1981

Honorable Strom Thurmond
United States Senator
for the State of South Carolina
New Senate Office Building
Washington, D. C.

Dear Senator Thurmond:

The decision of the Supreme Court in Owen v. Independence, 100 S.Ct. 1398 (1980) denying the defense of good faith to municipal defendants in Civil Rights actions under 42 U.S.C. §1983, is a matter of grave concern to public bodies and their attorneys in South Carolina and the entire nation. It appears that the only relief rests with the Congress through amendments to the statute as proposed by NIMLO in the attached Bill. As Columbia City Attorney, I earnestly urge you to sponsor and work for the passage of these amendments.

These amendments have the support of the Municipal Association of South Carolina and other governmental groups in this State. At the Mid-Winter meeting of the Government Law Section of the South Carolina Bar, presided over by Leo Hill of Greenville, attorneys representing many agencies and subdivisions of the State voiced unanimous support for such an effort.

The NIMLO resolution is supported by such long-time city attorneys as Emmet Walsh of Spartanburg and Charlie Spencer of Rock Hill as well as the newer members of the South Carolina City Attorneys representing Greenville, Charleston, North Charleston, Aiken and many smaller cities.

It makes no sense to these attorneys that a city which can act only through its officers and employees cannot plead the good faith of those officers and employees in defense of civil rights actions. The proposed amendments are not only logical, fair and just, but are essential to the financial health of all subdivisions of government. Insurance costs, if coverage can be obtained, will be out of reach for most towns and cities. Risk management will be paramount to the provision of basic services which may suffer curtailment or require added tax burdens to maintain.

We have been relatively lucky in South Carolina,both in the number of civil rights actions brought and the treatment given to us by our courts. However, this new decision has opened the door to much litigation which will lack merit but will still require funds for defense and payments under a ruling which makes cities insurers with absolute liability for acts of employees who have immunity. This position is untenable.

We desperately need your help in this matter and we stand ready to furnish any information and support which may be needed if you will undertake the lead in this effort. Charlie Rhyne and his NIMLO staff in Washington will gladly coordinate the nationwide support of municipal attorneys and render any assistance within their broad capabilities.

We appreciate your consideration of this urgent request and we are secure in the confidence that it could not be placed in more capable hands.

Very truly yours,

Roy D. Bates

ROY D. BATES
City Attorney

RDB:d
Enclosure

cc: Emmet Walsh, Esquire
City Attorney
City of Spartanburg, S. C.

cc: C. W. F. Spencer, Jr., Esquire
City Attorney
City of Rock Hill, S. C.

cc: Leo Hill, Esquire
City Attorney
City of Greer, S. C.

cc: Municipal Association

A BILL

To amend Sections 1979 and 722 of the Revised Statutes to limit the liability of states and political subdivisions and to limit attorney's fees in actions alleging violations of civil rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as "The Civil Rights and Attorney's Fees Awards Amendments of 1981."

SEC. 2. That the Revised Statutes Section 1979 (42 U.S.C. 1983) as amended is amended further as follows:

(a) By inserting "(a)" immediately before "every", and by striking the period after "Columbia" and inserting in lieu thereof ";";

(b) By adding the words "civil rights" immediately before "laws"; and

(c) By adding at the end thereof the following new subsection:

"(b) In any action, suit or proceeding inder the provisions of this Section, a State or a political subdivision of a State, including a municipality, county, town, borough, parish, village or school district, shall be immune from liability for damages or any other relief where the act complained of was performed in good faith by its officials or employees, or where the officials or employees are themselves immune from liability under this section.

SEC. 3. That the Revised Statutes Section 722 (42 U.S.C. 1988) as amended is amended further by striking the following: "to enforce a provision of sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, title IX of Public Law 92-318," by striking "or" immediately preceding "title VI of the Civil Rights Act of 1964" and inserting in lieu thereof the following: "by or on behalf of the United States of America, to enforce, or charging a violation of,"

7. AMENDMENT OF THE CIVIL RIGHTS ACT OF 1871

WHEREAS the Supreme Court of the United States in *Owen v. City of Independence*, 446 U. S. ____(1980)created a rule of absolute liability for municipal defendants in suits under the Civil Rights Act of 1871, 42 U. S.C. §1983, while retaining the good-faith defense for municipal officers and employees in the same suits;

WHEREAS §1983 actions may also be brought for violations of federal statutes unrelated to civil rights, and, in all §1983 actions, attorneys fees are available to prevailing plaintiffs;

WHEREAS this creates an unworkable rule for the courts to administer, and creates difficulties in the management of municipal personnel so as to reduce liability-provoking acts;

WHEREAS, since the *Owen* rule was based on a construction of the intent of Congress in 1871, the only remedy for this troublesome anomaly now is legislation amending §§1983 and 1988;

NOW THEREFORE BE IT RESOLVED that the National Institute of Municipal Law Officers fully supports legislation to amend 42 U.S.C. §§1983 and 1988 to provide that municipal defendants shall have available to them a good-faith defense on the same terms as such a defense is available to their municipal employees, to provide that the "laws" defining rights, privileges and immunities are limited to civil rights laws, and to eliminate the availability of attorneys fees to prevailing plaintiffs in actions against municipalities.

Senator HATCH. Thank you, Senator Thurmond.

Today, we have two witnesses we will call on—Prof. Charles Abernathy and Prof. Steven H. Steinglass—and then a panel of city attorneys.

At this time, we will call Prof. Charles Abernathy as our first witness.

Professor Abernathy is an associate professor of law at the Georgetown University Law Center. He teaches civil rights law and has written a casebook on that subject.

At the same time, perhaps we can have Steven H. Steinglass come and take his position beside Professor Abernathy.

Steven H. Steinglass is an associate professor of law at the Cleveland-Marshall College of Law, Cleveland State University. Professor Steinglass is representing the National Legal Aid and Defender Association.

We are happy to have both of you gentlemen and experts with us today, and we certainly look forward to hearing what you have to say.

I have one problem. I have to leave for about 10 minutes. Because of the conflicts in schedules and five committees that I am on, I have no choice other than to leave for about 10 minutes. Rather than delay this any further, I would like you to begin. If you finish, Professor Abernathy, then, Professor Steinglass, I would like you to take up, and then I will come back with some questions. I will try to be back within 10 minutes. But, if you do not mind, I would like to start so that we can get this matter going and then come back with the questions that I will have.

Professor Abernathy?

STATEMENT OF PROF. CHARLES ABERNATHY, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.

Mr. ABERNATHY. Thank you, Senator.

I am appearing here today in a nonadversarial role. I do not represent any organization, and my views, of course, do not necessarily represent those of Georgetown University Law Center.

I have prepared a written statement which I have given to the subcommittee, but I would like today to speak a little more simply on the issues which are presented here because they are very complex, and even speaking simply I think that the subcommittee will be able to discern the problems that face it with these two bills.

S. 584 AND LAWS

Let me begin with S. 584, which seeks to change the "and laws" language of section 1983 so that only equal rights laws violations would be covered by that statute, not violations of all Federal/State regulatory laws.

JURISDICTION

Some background is necessary here. Until 2 years ago, this entire issue was a minor jurisdictional problem. Whenever a plaintiff wished to sue under one of these Federal/State regulatory statutes, it simply amended or appended to a constitutional claim this Federal statutory claim.

The problem was that the Federal statutory claim usually could not meet the $10,000 amount requirement of section 1331. Section 1983 suits for constitutional claims, however, did not need to meet a dollar amount requirement under section 1343. Therefore, the pendent jurisdiction technique was really a way to get these Social Security Act cases and Federal/State regulatory loss cases into Federal court. This pendent jurisdiction technique was approved by the Court in *Hagans* v. *Lavine.*

The "and laws" language came up in a slightly different guise in these cases. It was basically seen as a way to avoid even using the pendent jurisdiction technique employed in *Hagans.*

The claim was that under the jurisdictional counterpart to section 1983—that is, section 1343 of title 28—that Social Security Act cases were equal rights laws cases, and so that no dollar amount requirement should be necessary for them at all. The Court rejected this approach in *Chapman* v. *Houston Welfare Rights Organization.*

THE MAINE DECISION

There is a second element in this background, and that is the *Maine* decision. The *Maine* case read the "and laws" language of section 1983, as opposed to the equal rights laws language of section 1343—the jurisdictional provision—to include these other statutes, such as the Social Security Act cases, and there resulted an anomaly.

There was a Federal cause of action through section 1983 for these kinds of cases, but there was no Federal jurisdiction under section 1343 to hear them. Pendent jurisdiction cases, however, could be maintained.

SECTION 1331 AMENDED

Third and finally in this background, Congress last year moved to eliminate the anomaly by amending section 1331 to remove the dollar amount entirely for Federal questions. Now, section 1983 cases under the "and laws" language can be brought in Federal court without regard to dollar amount.

This is the background of problems into which S. 584 steps. I would like to outline three concerns—which I think the subcommittee will hear—raised about S. 584. These are: First, what I shall call the cause of action problem—it is basically a concern that plaintiffs have—second, I will discuss the damages problem, a defendant's concern—and, third, I will discuss the attorney's fees problem, which is one for both plaintiffs and defendants.

IMPLIED CAUSE OF ACTION

Let me begin with the cause of action problem. Persons who support the decision in *Maine* v. *Thiboutot* are pleased because now they have a secure Federal statutory claim for cases which formerly were brought only under pendent jurisdiction.

One might wonder why these persons would be afraid of S. 584. The argument goes, I suppose: Why do they not simply revert to their *Hagans* v. *Lavine* approach where they used pendent jurisdiction, and they can still bring these kinds of cases—there is no need to worry about S. 584?

Well, I will have to go back to one of my background points here. The problem is that section 1331 has been amended to do away with the dollar amount requirement, and therefore there is no occasion for a plaintiff to use the pendent jurisdiction technique of *Hagans.*

Again, one might ask: So why are plaintiffs worried? Why do they not simply sue on that other Federal regulatory statute itself under section 1331 and they are in Federal court? That is precisely the problem which concerns the plaintiffs.

The pendent jurisdiction technique obscured the fact that the Court in these cases was really implying a private cause of action for what were essentially regulatory or governing-of-State-action type statutes. The Court rather blithely treated the problem of whether plaintiffs could actually sue to enforce these statutes.

Since these cases were first decided—and *Rosado* v. *Wyman* was the first one which really faced the issue and discussed it in some detail—the Court has decided *Cort* v. *Ash*, which makes it plain that Federal courts in the future will be much more reluctant to imply causes of action for private persons under these Federal regulatory statutes, and, of course, that is precisely what the plaintiffs fear will happen if S. 584 is passed.

They are afraid that their Federal regulatory statute claims, now stripped of the veneer of the constitutional claim under the *Hagans* approach, will have to face the *Cort* v. *Ash* test, and they are afraid the Court will not imply a private right of action. They will, in short, be out of court.

I personally think that this would not happen. If I were on the Court, I would not rule that way. It seems to me *Rosado* v. *Wyman* settles the issue. But I can see why plaintiffs are worried. They do not want to face the problem at all.

THE PROBLEM OF DAMAGES

Second, let me discuss the damages problem, a worry particularly for defendants in these cases. Under the *Hagans* approach of pendent jurisdiction, defendants essentially did not have to worry about damages. Relief primarily was injunctive relief, and that was all that the courts talked about.

The principal cases reaching any issue concerning monetary liability, such as the *Edelman* case, held that in the context of States, sovereign immunity protected the State. That would not protect local governments, of course, but the Court has never faced that issue.

The problem for municipalities and other defendants under the "and laws" language insofar as it leads us to a damage remedy under section 1983 is that they will now be liable for monetary relief, for which previously under the *Hagans* approach they would not have been liable.

Notice that my friend today who is speaking here with me notes that there may be APA-like review—that is essentially what some persons argue for—for these regulatory statutes if 1983 is read to include the "and laws" language. But even under APA-like review there would be no damage remedy, and that is really what bothers local governments.

And, as Senator Hatch mentioned earlier, the theory is that damages can rob local governments of the money they need to carry out important goals, often goals which are even related to the very statutory program the Federal Government has in mind.

THE PROBLEM OF ATTORNEY'S FEES

Third, let me reach the issue of attorney's fees. Of course, if a suit can be brought under section 1983 and its "and laws" language, then attorney's fees will be available under section 1988, the Attorney Fees Award Act of 1976.

To cities, this is just one more form of monetary liability. To plaintiffs, on the other hand, it makes cases possible by making it possible to secure an attorney.

I would just like to add as a note here that the constitutionality of extending the attorney's fees section to claims brought under the "and laws" language of 1983 has not been settled. That was the *Maher* v. *Gagne* case which was decided last term reserving that issue.

RECOMMENDATIONS ON S. 584

Let me attempt to resolve some of these concerns that I have pointed out with respect to S. 584. I will consider three possible routes that the subcommittee might want to take.

First, let me consider that the subcommittee may want to do nothing for a while. It may simply wait. The *Maine* decision is unclear. The Court may, for example, restrict its decision to Federal laws—"and laws"—for which the Court has already implied a private right of action. If that is, in fact, the way it interprets the "and laws" language, then the decision in the "Maine" case becomes much less important because it is not then a broad APA-like review provision.

If the Court does not take that route, it seems to me that the subcommittee may later want to do something in this area. I think it is unlikely that Congress would want to allow APA-like review of all Federal statutes.

If we look back over the last 10 or 15 years, this is precisely the issue that Congress has tried to avoid when it failed to put any provision into most of these statutes concerning private rights of action. Congress simply did not want to face that issue.

If the Court takes the wide reading of *Maine,* Congress now would be forced to settle that issue, and I take it that the subcommittee would have to act in some way.

PROVIDE FOR SOCIAL SECURITY ACT CASES

Second, if Congress does proceed, it seems to me necessary that the Congress will certainly want to permit some change in the language now proposed by the subcommittee so that Social Security Act cases and others of those previously recognized benefits-type cases allowed under *Hagans* will also be pursuable now under section 1983. This would, after all, only preserve the status quo.

It seems to me obvious that one of the things Congress had in mind when it amended section 1331 was to permit such cases, and such cases were, of course, permitted under *Hagans*.

So, if we simply want to preserve the status quo, some provision ought to be made for Social Security Act cases and beneficiary-type cases. I think there are sound policy reasons for this as well since, of course, these are the kinds of cases in which beneficiaries depend very greatly upon the Federal Government and prompt review in a judicial forum of any denial of benefits would be especially helpful to protect these persons.

The other Federal regulatory statutes, such as the Rodents Act mentioned earlier, seem to me to implicate beneficiary interests less severely.

POSSIBLE LIMITS ON RELIEF

Finally, the subcommittee may want to consider, along with its "and laws" changes, limiting the relief granted in these cases to injunctive relief. As I mentioned earlier, the Social Security Act cases which have proceeded are primarily injunctive relief cases, and in light of the damaging liability which would be occasioned by granting monetary relief, granting injunctive relief alone would also preserve the status quo.

With respect to attorney's fees, it seems to me that there also may be something which can be done other than changing the "and laws" language, as is proposed in S. 584. For example, one of the problems here is that municipalities feel that lawyers tend to run up their fees excessively.

OFFERS IN JUDGMENT

One of the possible solutions here is to amend section 1983, or perhaps even the Federal Rules of Civil Procedure, to overrule an earlier Supreme Court decision which would permit offers in judgment by defendants so that attorney's fees would not continue to accrue after a reasonable settlement had been offered.

S. 585—LIMITED MUNICIPAL IMMUNITY

Let me now turn to S. 585 and the good faith immunity which is proposed for municipalities. This bill essentially adopts Justice Powell's view in the *Owen* case. I think one of the reasons there may be some controversy over this provision is that there is much misunderstanding about precisely what the good faith immunity is.

The phrase "good faith" is, in fact, a misleading name for this immunity. There are actually two elements to the good faith immunity such as the Court recognized in *Wood* v. *Strickland*. One is the subjective good faith element.

Senator HATCH. Professor Abernathy, the five bells have rung. We have a rollcall vote. I am going to run over and vote. I have asked Senator Grassley to leave earlier so he can come back and continue to take your testimony.

I would like you to continue, and we will just be back as soon as we can. But if you will continue, and then, Professor Steinglass, if you will continue right afterwards, we will appreciate it.

Mr. ABERNATHY. Certainly.

I had just outlined the good faith element in the good faith immunity. That demands, really, that defendants not have acted in a belligerent or bad faith way in harming plaintiffs. There is also an objective element to good faith. That is, defendants are charged with knowing settled constitutional law.

ONLY APPLICABLE WHERE LAW UNSETTLED

So the application of a good faith immunity in the municipal areas such as proposed in S. 585 is really a very narrow immunity. Immunity would only apply when there is this subjective good faith and, most importantly, objectively the city had acted in an area where constitutional law was unsettled.

This is a very narrow immunity because, for the most part, constitutional law contains quite a few settled ideas, despite what it may appear at times. For example, there would be no immunity, I assume, in a situation where a city-owned gas utility cuts off service to persons without a hearing because it is already settled that that is a due process violation.

Similar ideas would apply in the racial discrimination area where ideas are faily well settled and also in first amendment cases where we have a fairly good collection of cases setting out free speech principles.

In short, S. 585 is by no means an absolute immunity for municipalities.

TECHNICAL PERFECTIONS

Let me suggest, before I go on to examine the merits and concerns of the provision, that there should be some technical perfections made on this bill so as to bring in line with the express intentions of its author.

As it is now drafted, it defeats an entire suit—damages as well as injunctive relief. As I read the floor statement, the author's purpose is only to bring this immunity into line with the official immunities recognized for individual officers, and that, of course, is a good faith immunity only against damages.

The reason for this is obvious: If there were complete immunity, there could be no injunctive relief even to stop the threat of continuing violations.

This perfection could easily be taken to the bill by simply adding the language "for damages" so that S. 585 would read, "no action for damages shall be maintained."

Let me suggest another technical perfection. The bill uses the phrase "political subdivision," which I think is probably too vague a term. As the subcommittee is aware, local governments are covered under Section 1983, but State and State-level agencies are not. The problem is discussed in the *Lake Country Estates* case decided by the Supreme Court a few years ago.

"Political subdivision," the language used in 585 now, may be read in the future impliedly to bring some of these now uncovered State-level agencies under section 1983 and to leave them only with good faith immunity. I assume that that would not be the author's intent—to expand section 1983—and in line with preserving the author's intent I would suggest that that technical perfection be made. Alternative words could be something along the lines of "Governmental units covered under subsection A." I think that would take care of the problem.

Now let me turn to the merits of S. 585. I find the reasons given for this bill to be somewhat persuasive, given the very narrow scope of the immunity involved—that is, an immunity only where constitutional law is unsettled.

DETERRENT EFFECT

First, I value very greatly under section 1983 the deterrent effect which the statute creates, and where constitutional law is unsettled it seems to me that there is not a very great deterrent effect in holding a municipality or defendants liable except to the extent that we deter local governmental units from the very act of governing. I think the act of governing is a strong governmental interest and should not be so constricted.

It also seems that in this situation the cost to the city from guessing wrong may be very high—as I shall discuss shortly—and so it may be that the balance of equities when the law is unsettled calls for the city to be protected while it goes about the task of governing.

EFFECT ON LAW REFORM

I am also concerned that failure to recognize local governmental immunity may also hurt constitutional law reform in this area where, by definition, constitutional law is unsettled. If courts are aware that every ruling for plaintiffs will involve dollar liabilities, the courts may be very reluctant to extend constitutional protections so as to bind cities in ways which they were not bound previously.

This problem has arisen before in the context of the good faith immunity for individual officers. I call your attention to the *Wood* case where the Court refused to extend an absolute liability to school officials. The *Wood* case was followed shortly afterwards by the Supreme Court's decision in the *Ingraham* case where the Court placed very few restrictions on school officials in dealing with their students. It seems to me those two cases must be looked at as a pair.

EFFECT ON DAMAGES

Similarly, refusing to recognize an immunity may also skew the Court's rulings on the measure of damages in section 1983 cases. The Court has already taken a fairly wary look at the issue of damages in the *Carey* case, and I am afraid if municipalities were liable under the "and laws" provision the Court might go out of its way to make the damages issue much narrower than it is already due to the *Carey* decision.

EFFECT ON VICTIM

Despite these agreements with the principles underlying S. 585, I nevertheless have some trouble resolving these issues because the application of the immunity will necessarily make the victim bear the entire cost of the city's wrong. There will be no spreading of these costs throughout the city's tax base.

CLARIFYING WHEN MUNICIPALITY LIABLE

Let me therefore suggest several alternatives which may have less all or nothing consequences. First, let me recall to the subcommittee's attention that municipalities are not always and automatically liable for all the unconstitutional or statutory violations of every individual employee.

Only when an official policy or custom is made at the city level so that the Court can fairly assume that the city itself should be responsible will a city be held responsible under section 1983. As you might imagine, this is a fairly vague line, and one of the things the subcommittee might want to consider is removing this vagueness.

Senator Mathias has proposed a bill, this Congress labeled S. 990, which would accomplish precisely this goal. If some certainty were introduced into municipal liability, such as S. 990 would do, then the city would be able much better to plan its liability to take steps to deter liability by its employees.

INSURANCE

In short, the city could undertake two very important tasks: one, risk management; and, two, and relatedly, find an insurer. The reason no insurance policies are available today is that insurance underwriters are extremely reluctant to step into an area where the municipality's liabilities are so vague.

With some certainty, the entire area might become insurable and, as a consequence, municipalities would be protected from inordinate judgments but victims, at the same time, could be made whole.

LIMIT ON DAMAGES

Let me suggest that, rather than the all-or-nothing municipal immunity approach, the subcommittee might want to take a look at placing a monetary limit on the damage recoveries available under section 1983.

I have mentioned in my written testimony, for example, the figure $50,000 exclusive of medical fees. This figure seems to be a high enough one that would cover most personal damages arising in a section 1983 case while, at the same time, not bankrupting local governments.

Alternatively, the subcommittee might also want to amend section 1983 so that in certain topical areas where damages are likely to be very high, damages not be awarded but only injunctive relief would be available.

We should remember in this regard that section 1983 is not just a statute for poor people. It can be used whenever anyone's constitutional and "and laws" rights are at stake, and that applies to companies and corporations as well.

LAND USE PROBLEMS

In this regard, we have one overriding problem. That is the problem of land use controls by municipal government, a problem which has received much Supreme Court attention lately. This is an area where damage liabilities could, in fact, be astronomical.

I am not worried about police misconduct cases because the damages there ordinarily run less than $10,000—they are very slight. The imposition of costs on a municipality would not be great. On the other hand, in a land zoning case the damages might be in the millions of dollars, and for small municipalities around the country faced with problems raising their taxes these might, in fact, be very onerous burdens.

One of the solutions here would be to do what some States have done and to allow only injunctive relief in land use cases. You might, for example, take a look at the *City of Tiburon* case and the *Fred French Investment Company* case. Those were from California and New York and show the way that the State courts have faced that problem.

There may be other similar topical areas that the subcommittee might want to look into.

CONCLUSION

Finally, I would like to stress that S. 584 and S. 585 are reasonable and moderate alternatives to the Court's current construction of section 1983 if some minor changes can be made to accommodate valid criticism that the subcommittee is likely to encounter during these hearings.

S. 584, in particular, may be prematurely offered in light of the problems with interpreting the *Maine* decision. But that bill would prove satisfactory if some way could be found to accommodate Social Security Act cases and other beneficiary-type cases seeking injunctive relief.

S. 585, given the very narrow problem on which it focuses—municipal liability only and only where constitutional law is unsettled—will undoubtedly draw strong support from local governments during these fiscally difficult times, and if it can be technically perfected as I suggested earlier, it is readily defensible, although I think the subcommittee might want to consider some of the alternatives which have less than the all-or-nothing quality that I have discussed earlier.

Thank you.

Senator HATCH. Thank you, Professor Abernathy. Without objection, your prepared text will be included at this point.

[Material follows:]

Statement of
Charles F. Abernathy
on S.584 and S.585

Much of the current discussion of constitutional litigation against state officials assumes that all of it started only twenty years ago when the Supreme Court decided *Monroe v. Pape*, 365 U.S. 167 (1961), but that, of course, is untrue. Much constitutional litigation occurred before 1961 in state courts, in the United States Supreme Court during appeals, and even in federal trial courts, in some very narrow cases which to us now seem very much like common law claims. What *Monroe v. Pape* did accomplish was to place constitutional litigation on a solid federal statutory footing, in federal trial courts, to be conducted as civil litigation. To a very great degree *Monroe* was the culmination of the trend begun in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), an end to federal dallying with state law and fuzzy common law, as much as it was the beginning of a modern judicial concern with constitutional rights.

One might have expected that this movement toward use of federal statutes as vehicles for civil rights litigation would have encouraged greater certainty in Supreme Court decisions as they focused on statutory language and greater Congressional activity as legislators adjusted statutory language to meet modern demands, but neither of these phenomena has appeared with respect to §1983. The statutory language has served as little more than a series of pegs on which to hang policy-based decisions, both liberal and conservative, and sometimes an entire line of cases is spawned by what the statute does not say--the official immunity which we shall discuss today is one example.[1] Nor has Congress participated; §1983 has not been touched since Monroe was decided.

The two bills under consideration today S.584 and S.585, together with an omnibus bill introduced separately, S.990, mark a significant departure from this period of Congressional quiessence. I am pleased to appear to provide background information for the Subcommittee's consideration of S.584 and S.585.

S.584-Revision of "and laws"

S.584 seeks to amend §1983 by deleting its reference to "and laws" and substituting a narrower phrase connoting only federal laws providing for equal rights. The resulting change would limit §1983 to suits against state officials to enforce constitutional law and federal equal-rights laws rather than constitutional law and all federal laws. There is no suggestion in the bill that §1983 should be limited to constitutional claims alone.

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[1] In Pierson v. Ray, 386 U.S. 547 (1967), the Court noted that §1983 contained not a a single word mentioning immunities, but reasoned that this did not mean that Congress wanted "to abolish wholesale all common-law immunities." Rather, the Court held, that silence meant that Congress wanted to preserve these immunities. That the immunities are actually judicial creations is shown in Butz v. Economon, 438 U.S. 478 (1978) (immunities constructed under §1983 for state officials also available to federal officials not covered by §1983 but by Constitution generally).

If one had asked knowledgeable lawyers only two years ago to explain the significance of the "and laws" language, they would have described an obscure jurisdictional issue. At that time, the federal jurisdictional counterpart to §1983, 28 U.S.C. §1343, provided that constitutional and statutory-based equal rights claims could be brought in federal district court without regard to the usual $10,000 jurisdictional amount for federal questions under 28 U.S.C. §1331. When seeking judicial enforcement of statutes which did not fit the "equal rights" rubric, such as the Social Security Act, plaintiffs' lawyers resorted to the technique of attacking a state's policy on both constitutional and statutory--Social Security Act--grounds. They claimed jurisdiction under §1343 for the constitutional claim and "pendent jurisdiction" for the related Social Security Act claim which alone would not have been able to meet the $10,000 amount of §1331. _See Hagans v. Lavine_, 415 U.S. 528 (1974). The Supreme Court later rejected an attempt to claim jurisdiction under §1343 for the statutory claim alone, _Chapman v. Houston Welfare Rights Organization_, 441 U.S. 600 (1979), but the decision seemed gratuitous--it was only of academic interest--given the ease of using the _Hagans_-approved pendent jurisdiction technique. Even academicians lost interest last December when Congress amended §1331 to eliminate the jurisdictional amount for all federal questions, rendering even the pendent jurisdiction ruse irrelevant.

Those who saw death for the issue, however, underestimated the power of those trained in law to find problems previously undiscerned by ordinary mortals, or even other lawyers. The immediate precipitant of the new issue was the Court's decision a year ago in Maine v. Thiboutot, 100 S.Ct. 2502 (1980). There the majority held that although there was no jurisdiction over statutory-based federal claims like those under the Social Security Act, there nevertheless was a specific cause of action for statutes under §1983's "and laws" language. (These claims would have been filed in state court--as in Maine--had Congress not removed the jurisdictional amount in §1331 as described above.)

What would be accomplished, one might ask, by reading a separate statutory violation into §1983? Why do it? Why not undo it, as S.584 seeks to do? Here is where lawyers earn their keep. The most obvious reason for reading separate statutes into §1983's "and laws" language was to win for plaintiffs the attorney's fees which are available to prevailing plaintiffs under §1983. See 42 U.S.C. §1988. No such fees would be available if the federal statutes were sued on alone, that is, were suits brought under the other statutes themselves rather than the "and laws" language in §1983.[2]

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[2] In Maher v. Gagne, 100 S.Ct. 2570 (1980), the Court upheld the constitutionality of awarding fees for Social Security Act cases brought as Hagans-type pendent claims to a §1983 suit. It referred to Congress' power under §5 of the Fourteenth Amendment to override state sovereign immunity when the entire case presented both constitutional and statutory claims. The Court declined to rule on, and its rationale in Gagne does not appear to cover, such statutory claims if brought in federal court under the "and laws" language of §1983. Id. at 2575. (Maine did not present this constitutional issue since that case arose in state

(Footnote continued)

There is more to it than even this. During the years that the Court allowed federal trial courts to hear Social Security Act cases under pendent jurisdiction, it failed to make perfectly clear what it was that authorized disappointed beneficiaries to sue under the Soecial Security Act, a substantial problem since the Act appeared to be only regulatory in nature and directed toward federal agency, not judicial, enforcement of beneficiaries' interests. This in turn raises what one might call a collateral issue but which is actually at the core of the problems under consideration today--the issue of implied private rights (causes) of action.

Congress has over the years drafted scores of regulatory statutes in which it failed to make clear whether the standards it imposed would be enforced only by federal agencies or also by federal courts in private suits initiated by beneficiaries of the statutes. The Supreme Court rather freely "implied" private rights of action under some of these statutes, and it was especially easy to do so in cases where the statutory claim, such as one under the Social Security Act was joined, as in _Hagans_, with a constitutional claim explicitly authorized by §1983. _See_ _Rosado_ _v._ _Wyman_, 397 U.S. 397, 405-07 (1970) (Social Security Act permits private suits); _Lau_ _v._ _Nichols_, 414 U.S. 563 (1974) (private suit to enforce Title VI of 1964 Civil Rights Act permitted; joined with §1983 claim). The Court effectively enlisted Congress's aid in deciding cases by permitting private

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2. (continued) court where fee awards are not controlled by the Eleventh Amendment.)

suits under the regulatory statutes and then deciding cases on that statutory rather than controversial constitutional ground presented under §1983. The name of the game was "let Congress take some of this heat."

This period drew to a close in 1974 when a majority on the Court perceived that such free implication of private rights to sue involved the judiciary increasingly in intrusions into areas of agency expertise --and state interests. Consequently, in Cort v. Ash, 422 U.S. 66 (1975), the Court developed a new four-part test designed to restrict severely the number of implied rights of action the Justices would read into Congress's silent regulatory statutes.[3]

Where does all of this leave us now? It shapes the positions of the parties I expect you to hear today and tomorrow. Those you oppose S.584 do not do so to preserve their right to attorney's fees, though the fees are very important, but to preserve their very right to go to court. Now that §1331 has been amended to eliminate the dollar-amount requirement, there is no occasion to use the obscuring pendent jurisdiction technique of Hagans, and if the "and laws" language is narrowed, as S.584

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[3] Jurists no less than Senators have their hidden agendas, and Justice Rehnquist, who led the fight against implied remedies, may well have intended to fore-signal the harshness of the Court's later Cort approach when in Edelman v. Jordan, 415 U.S. 651 (1974), he intimated that Social Security Act claims could be sued on in federal court only by virtue of their Hagans-type tie to §1983. Justice Brennan caught that sloppy draftsmanship and paraded it before Justice Rehnquist in Maine to show that the Court had always meant §1983's "and laws" language to include suits on other statutes which did not explicitly provide a right to sue. 100 S.Ct. at 2504.

proposes, Social Security Act claims will have to live or die on their own under Cort. Similarly, other law reform groups than those concerned with the Social Security Act may see in Maine salvation for their Cort problems, for Maine holds out the hope that all federal statutes governing state officials may be sued on via §1983.

For these same reasons others oppose Maine and its wide reading of "and laws." But not only do they fear wholesale implications of rights to sue,[4] they also fear the special additional problems which arise when §1983 is used to imply a remedy. Principal among these is the damage remedy which goes along with a §1983 claim. Implied directly from the regulatory statute, a private right of action might be limited to injunctive relief only, see, e.g., Drayden v. Needville Indep. Sch. Dist., No. 80-1125 (5th Cir. April 8, 1981) (no damages remedy for private plaintiff under Title VI); but the normal reading of §1983 would permit such damages in an "action at law."

S.584 resolves these contending arguments in favor of limitation, probably because its author also fears the expansion of implied rights and damage remedies noted above. The bill could have eliminated the "and laws" language completely, but instead it takes the moderate stance of returning §1983 to the interpretation which prevailed after Chapman and before Maine. While this approach is reasonable one, I suggest that some additional factors be considered.

First, it is premature to assume that the Court will take the widest reading of Maine. It is entirely possible that the

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[4] See Justice Powell's list in Maine, 100 S.Ct. 2519-20.

Court will limit §1983's "and laws" language only to those statutes which the Court already recognizes to have implied private rights of action. Despite Justice Rehnquist's statement in Eldeman or Justice Brennan's use of it in Maine, see note 3 supra, many of us would have thought that Rosado v. Wyman implied a private action under the Social Security Act. Maine may stop there. If the Court goes further to cover "all laws," the remedial action will certainly be necessary, for wholesale private enforcement of hundreds of federal statutes regulating state officials was never envisioned in 1871 or 1874, and it seems unwise today. It would effectively settle in favor of beneficiaries the issue Congress has long avoided settling -- whether or how often private suits should be permitted under federal regulatory statutes. For now, however, this problem may solve itself and perhaps should be left alone.

Second, adopting a narrow "equal-rights-laws" phrase as an alternative to §1983's current language imposes a special hardship on plaintiffs in Social Security Act cases and may unwittingly undo what Congress intended when it amended §1331 last year. In all likelihood, as noted above, a court would imply a private right of action under Social Security Act, citing Rosado, so that such actions could still be brought in federal court even should S.584 be enacted. Certainly, Congress dropped the dollar amount requirement in §1331 so that such suits under the Act would be permitted in federal court. But persons active in enforcing the Social Security Act should not be forced to worry about whether their gains will be preserved. If the

Subcommittee wishes actually to preserve the status quo ante Maine, and also Congress' goal in amending §1331, it should reword S.584 to provide for suits, at least for injunctive relief, under the Social Security Act, and perhaps other statutes.

S.585--Limited Municipal Immunity

Background considerations for S.585 are only slightly less complicated than those for S.584. This bill would overturn the Court's decision in Owen v. city of Independence, 100 S.Ct. 1398 (1980), by providing a good-faith immunity for municipalities similar to that given most municipal officers. The bill would not overrule Monell v. Department of Social Services, 436 U.S. 658 (1978), and return us to the days when local governments were completely immune from suit under §1983. See Monroe v. Pape, supra. As with S.584, S.585 is no radical attempt to roll back all of the Court's decisions since Monell, but simply takes the position of the four dissenters in Owen.

Initially, however, two technical changes are necessary to bring S.585 into line with its author's expressed intent. The floor statement indicates that the immunity meant to be created would serve the same role for municipalities that the official good-faith immunity serves for individual officers, thereby echoing Justice Powell's opinion in Owen. But such an immunity only protects against damages, not injunctive relief, and the reason for this is obvious: if injunctive relief were also precluded, the threat of continuing violations could not be eliminated. S.585 could be brought in line with the author's intent by expanding its language as follows --"No civil action for damages maybe brought . . . ." Another technical problem is the use of the phrase "political subdivision of a State." Currently, States and their agency-level subdivisions are not "persons" included under §1983, see Quern v. Jordan, 99 S.Ct. 1139 (1979), but local governments are covered "persons," Monell, supra. The problem is illustrated in Lake Country Estates v. Tahoe Regional Planning Agency, 99 S.Ct. 1171 (1979) (bi-state authority is like municipality, covered by §1983). The phrase currently used in S.585 may lead courts to interpret the amendment expansively to bring all political subdivisions under §1983 and give them all only a good-faith immunity. The author's intent would be served by adopting the substitute phrase "local governmental units covered under subsection (a)."

With these technical perfections, the range of criticism of S.585 narrows considerably. The operative effect of the good-faith immunity would be to protect decisions taken when constitutional law is unsettled. See Wood v. Strickland, 420 U.S. 308 (1975) (objective element of immunity charges defendant with duty to learn settled constitutional law). From the plaintiff's viewpoint, that means that some injuries, albeit not foreseeable by defendants as being unconstitutional, will nevertheless go uncompensated. Plaintiffs would rather see this harm borne widely, through the municipal tax base, rather than by the individual alone.

I find much to recommend in S.585 because I agree that the principal thrust of §1983 ought to be deterrence rather than compensation.[5] I also fear that large judgments, especially from the increasing use of §1983 to protect corporate constitutional rights where large sums may be at issue, _see_ _Central Hudson Gas v. Public Service Comm'n._, 100 S.Ct. 2343 (1980), could wipe out the budgets of small municipalities, especially those whose taxing or spending power maybe limited by state law. And while certainly the lack of municipal immunity acts as a deterrent, it is not a well-tailored one. There is, of course, some deterrent effect whenever law--constitutional or otherwise--is unclear because the affected party will steer far clear of the vague law for fear of being ensnared in its imprecise terms. _Cf._ _United States v. National Dairy Products Corp._, 372 U.S. 29 (1963) (vague criminal statute). Here, however, the affected party is carrying out an important public service--governing--and encouraging that party to steer clear of the imprecise constitutional line may prevent it from acting boldly enough to solve local problems. _Cf._ _Smith v. Goguen_, 415 U.S. 566 (1974) (problems of vagueness in inhibiting valuable private speech).

I also fear that the present regime under _Owen_ may actually inhibit the proper development of constitutional law. Constitutional law, no less than other law, is a seamless web, and a court's knowledge that its decision may result in monetary liability for a municipality may induce that court to decide "unsettled constitutional law" in favor of municipal power. It has happened before. Compare Wood v. Strickland, supra, (no absolute immunity for school board members) with Ingraham v. Wright, 430 U.S. 651 (1977) (narrowly construing due-process restraints placed on unimmunized school officials).

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[5] Justice Powell relied upon the deterrent goal of §1983 to support his wide view of municipal immunity in _Owen_. He had, however, only one term earlier rejected the same view in a damage action brought under §1983, ruling instead that the statute's primary goal was compensation, not deterrence.

(Footnote continued)

Nevertheless, the underlying consideration here, protecting the local fisc, may be a mirage. The idea of bankruptingly large §1983 judgments is by and large a figment of the imagination of after-dinner speech-makers. While sums demanded in complaints are often headline-worthy, sums actually recovered merit a story opposite the obituary page. In the ordinary police-misconduct case, recoveries, in my experience, run below five figures --and they are few. Moreover, such cases are unlikely to be prosecutable against anyone other than individual officers, since only individual misconduct is at issue. Cf. Belcher v. Stengel, 522 F.2d 438 (6th Cir. 1975), cert. denied, 429 U.S. 118 (1976) (large judgement). Larger recoveries usually involve lost wages or some other reasonably verifiable damages, and the Court's decision in Carey v. Piphus, 435 U.S. 247 (1978), seems to indicate that open-ended judgments based on mere violation of a right will be unlikely.

The difficulty of resolving this issue leads me to believe that perhaps the Subcommittee should consider alternatives other than ones which give either complete recovery or none. Two come

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5. (continued)
See Carey v. Piphus, 435 U.S. 248 (1978). I find deterrence important in both situations.

to mind.

First, it should be recalled that a municipality is not liable under §1983 for all the unconstitutional acts of its employees, but only those which fairly may be said to have been committed by the municipality through conscious policy, statute, or custom. Monell, supra. If more certainty could be brought to the standards governing attribution of municipal liability, such as those contained in S.990, we could perhaps lend enough predictability to this area to make the risks insurable. This would both compensate the harmed plaintiff as well as guard against catastrophic judgments against cities.

Along this same line the Subcommittee may consider placing an upper limit on sums recoverable under §1983 or a restriction on the types of recovery permitted in particular cases. An example of the former would be a $50,000 limit, excluding actual medical expenses, a sum adequate to protect most plaintiffs while representing a reasonably low figure which municipalities could pay. An example of the latter would be restrictions on damage recoveries in expensive zoning or land-use cases so that injunctive relief becomes the perferred remedy. See Agins v. City of Tiburon, 24 Cal. 3d 410 (S.Ct. Calif. 1979), aff'd, 100 S.Ct. 2138 1980); Fred French Inv. Co. v. City of New York, 39 N.Y.2d 587 (Ct. App. N.Y. 1976) (state rules for compensation in zoning cases).

These considerations also suggest that here, as under S.584, the Subcommittee may want to consider more comprehensively, and separately, liability issues arising in the context of damages and those arising in the context of injunctive relief. If, for example, more supervisory duties were placed on senior officers or the municipality itself when injunctive relief is at issue, counter to the position adopted by the Court in Rizzo v. Goode, 423 U.S. 362 (1976), the occasion for many damage suits against a municipality could be eliminated.

Summary

S.584 and S.585 are reasonable and moderate alternatives to the Court's current construction of §1983 if some minor changes can be made to accommodate criticism the Subcommittee is likely to encounter during these hearings. S.584, in particular, may be prematurely offered, but would prove satisfactory if some way could be found to accommodate Social Security Act cases seeking injunctive relief. S.585, given the narrow problem on which it focuses --municipal liability only and only where constitutional law is unsettled, will undoubtedly draw strong support from local governments during these fiscally difficult times. As technically perfected the bill is readily defensible, although the Subcommittee may want to consider alternatives which have a less all-or-nothing quality.

Charles F. Abernathy
Associate Professor of Law
Georgetown Unviersity Law
Center

May 6, 1981

STATEMENT OF STEVEN H. STEINGLASS, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, WASHINGTON, D.C.

Mr. STEINGLASS. Mr. Chairman and distinguished members of the Subcommittee on the Constitution, I want to thank you for the opportunity to testify before you today.

I am an associate professor of law at the Cleveland-Marshall College of Law in Cleveland, Ohio, and am a member of the bar of the State of Wisconsin and the State of Ohio. I appear today in behalf of the National Legal Aid and Defender Association and its access to justice project to testify on S. 584 and S. 585.

I have submitted for the record a written statement, and I will try to summarize its highlights now.

The National Legal Aid and Defender Association is a private, nonprofit organization devoted to the support and development of quality legal services for low-income persons. Its membership consists of over 2,700 organizations throughout the country that provide representation in civil and criminal cases.

We oppose both S. 584 and S. 585, two proposals that we believe will seriously limit the ability of victims of illegal Government action to obtain redress.

S. 584 would limit the applicability of 42 U.S.C. section 1983 by eliminating certain private causes of action to redress violations of Federal statutory law. S. 585, on the other hand, would not eliminate any causes of action. Rather, it would shield local governments that have violated Federal statutes or the Constitution by providing them a qualified immunity. This would permit local governments to avoid accountability for the actions they have taken.

In addition, S. 585, as currently drafted, whether intentionally or not, would extend to injunctive actions. Thus, if enacted as drafted, it would permit local governments involved in continuing illegal activity, albeit in good faith, to continue to violate the law.

S. 584

S. 584 would have far-reaching consequences in the relationship between individuals and their Government. It would cut off completely private enforcement of certain Federal statutes regardless of how flagrant or intentional the violation of Federal law might have been. As presently drafted, it would make unavailable both damages and injunctions in many statutory cases.

To understand the significance of this proposal, one has to go back to the decision in *Maine* v. *Thiboutot*, a 1980 decision of the U.S. Supreme Court, and to section 1983 of title 42.

Section 1983 provides a cause of action for the violation under color of State law of any right, privilege, or immunity secured by the Constitution and laws. Unlike most civil rights statutes, it confers no substantive rights. Rather, it provides a procedural vehicle to make possible private enforcement of Federal rights which have been violated.

In *Thiboutot*, the Supreme Court affirmed the decision of the Supreme Judicial Court of Maine that the unmodified phrase "and laws" in 1983 extended to title IV-A of the Social Security Act. This decision, and particularly Justice Powell's dissent, is apparently responsible for the attention that recently has been focused on the meaning and scope of 1983.

In his opinion, Justice Powell suggested that somehow the commonsense reading of the phrase "and laws" to include the Social Security Act constituted an expansion of 1983 and, hence, the Federal statutes that could be enforced under it.

Despite precedent to the contrary as well as practice to the contrary, he argued that "and laws" really meant only laws providing for equal rights. And, since the Social Security Act has been held not to provide for equal rights, *Thiboutot*, Justice Powell suggested, was wrongly decided.

He also raised the spectre of State and local officials being harassed by the resulting litigation as new cases are filed in the already overburdened courts.

We believe that a careful analysis of the law governing 1983 shows that the concerns of the dissent are misplaced. S. 584 would seriously reduce the power of individual Americans vis-a-vis their Government. By removing the availability of a judicial forum, it would immunize illegal actions of State and local governments, no matter how intentional or knowing the violations of Federal statutes might have been.

The question is not whether State courts or Federal courts will hear these cases. State and Federal courts have concurrent jurisdiction over 1983 actions, and it has become commonplace for litigants to file such cases in State courts.

In fact, *Thiboutot*, the very case that focused attention on many of these problems, was a State court case. Therefore, the question is whether any court—State or Federal—will be able to hear actions based on alleged violations of certain Federal statutory rights.

Despite the discussion so far, this topic should not be seen as abstract and complex. Perhaps I can try to identify a number of situations in which 1983, because of the interpretation of the phrase "and laws", has been the vehicle for vindicating rights of individuals who have grievances against their State or local government.

For example, aged, blind, and disabled applicants for public assistance benefits in Illinois were not provided benefits within required time periods. The phrase "and laws", if deleted from section 1983, has the potential of depriving such individuals of an action for injunctive relief.

Similarly, migrant farmworkers in Florida who were denied appropriate services by the State Employment Service would no longer be assured a statutory cause of action.

Also no longer assured a statutory cause of action would be New York residents denied essential medical services under medicaid.

Similarly, unemployed workers in California who were denied payment of unemployment compensation and Illinois families denied foster care benefits were plaintiffs who claimed that their statutory rights were violated by State or local officials and that Federal officials had not taken effective action to enforce Federal law. These individuals sought judicial relief and were permitted to maintain private actions to enforce their Federal statutory rights.

We have reviewed carefully the background of 1983 and developments before and since the *Thiboutot* decision and have concluded that S. 584 should be opposed for the following reasons:

First, *Thiboutot* is not a departure from existing law. To be sure, this case represents the first time the Supreme Court squarely addressed the phrase "and laws" in section 1983 and reached a definitive conclusion as to its meaning. However, 1983 actions to enforce Federal statutes not providing for equal rights have been a feature of 1983 litigation for many years.

More than 30 years ago, Judge Learned Hand found a statutory cause of action authorized by section 1983 to protect the employment rights of a public school teacher whose absences were caused by Federal jury service. Since the landmark decision in *Monroe* v. *Pape* in 1961, statutory-based 1983 actions have been a small but significant part of 1983 litigation.

Because *Thiboutot* only clarifies that which most litigants and many lower courts knew—namely, that 1983 authorized a cause of action to enforce Federal statutory rights—and because of the importance of private enforcement in this area, we welcomed the Court's decision in *Thiboutot.*

However, because *Thiboutot* is not a departure from prior law and certainly not from prior practice, any legislation to overturn it would also affect those other statutes that have been enforced through 1983.

Thus, we see the impact of S. 584 going far beyond the provisions of the Social Security Act before the Court in *Thiboutot.*

Second, much of the concern about the implications of *Thiboutot* is based on an incorrect reading of the decision. The phrase "and laws" in 1983, when given its literal construction, does not, by itself, permit litigation to enforce violations of Federal statutory law. Such a construction is necessary but is not sufficient to permit private enforcement.

Thus, *Thiboutot* only addresses the first step in determining whether private enforcement is available. The second step involves an inquiry concerning the specific Federal statute at issue.

Where Congress has expressed its intention to preclude private enforcement, that decision will govern. As Justice Powell acknowledged in *Thiboutot,* 1983 will not authorize a private action in cases where Federal statutes provide an exclusive remedy for violation of its terms.

In many ways, section 1983 can be looked at as a State and local analog to the Administrative Procedure Act, which authorizes judicial review of actions of Federal agencies. Like the APA, section 1983 should be viewed as presuming the availability of judicial review.

Where Congress is silent on the availability of judicial review, it should be presumed to be available under 1983. However, where Congress precludes such judicial review, it should, of course, not be permitted, despite the language of the APA or the language of section 1983.

Since *Thiboutot* does not, by itself, result in an expansion of Federal statutes that may be privately enforced through 1983, those who fear that the decision authorizes private enforcement of all Federal statutes are simply mistaken, and our review of post-*Thiboutot* cases in which lower courts have found some statutes enforceable under 1983 and other Federal statutes not enforceable confirms this view.

Third, we believe legislation at this time to amend section 1983 to modify the phrase "and laws" is inadvisable because the law is unclear and in a state of flux. Courts are reaching different conclusions as to the availability of private enforcement of specific statutes. Because of this uncertainty, it is not possible to determine precisely what impact S. 584 would have.

Therefore, legislation at this time would not clarify the law but would lead to serious confusion as to the availability of private enforcement, and unless Congress was willing to undertake a statute-by-statute analysis to determine whether the limitation on 1983 would eliminate private enforcement we believe that S. 584 should not be considered.

Fourth, predictions made concerning the implications of *Thiboutot* on caseload appear to be without basis. We are not aware of statistics on the precise number of statutory 1983 cases that are being filed. We do not believe it is likely to become a significant burden on the Federal or the State courts.

We note however, based on the 1980 Annual Report of the Administrator of the United States Courts, that in the year ending June 30, 1980, there were only 170 cases filed against State and local governments described as welfare cases.

Thus, 12 years after the 1968 decision in *King* v. *Smith,* in which the Supreme Court first permitted a 1983 action to enforce title IV-A of the Social Security Act, an average of less than one-half case per district court judge per year is being filed. This hardly suggests the existence of a burden which requires legislative action.

Fifth, we have not seen and are not aware of any harassment that has taken place with respect to statutory-based 1983 actions, and, in any event, the Federal courts retain appropriate tools to deal with frivolous actions, including the awarding of attorney's fees against plaintiffs and attorneys who commence or maintain such actions.

Sixth, the limitation on statutory 1983 actions will not, we believe, result in such disputes being kept out of court. The proposed amendment to 1983 does not in any way limit the range of constitutional issues that plaintiffs may raise, and an unintended but inevitable result of the elimination of private enforcement of Federal statues would be an increase in efforts to frame the same dispute in constitutional terms.

In addition, suits against Federal officials who have failed to enforce statutory rights are also likely to increase. Thus, passage of S. 584 will probably not reduce and may even expand the volume of litigation and will certainly result in an increase in constitutional-based decisions.

Finally, we wish to speak to the importance of private enforcement in this area. We suggest no disrespect for the ability, commitment, or fidelity to the law of members of the Federal bureaucracy when we suggest that it is inappropriate to give them exclusive responsibility for enforcing Federal law.

It would be surprising, indeed, if this Congress, committed as it is to helping get Government off the backs of the people, denied the American people the ability to enforce privately their rights.

S. 584 will say to citizens who have been injured by local government action that their only recourse is to complain to the Federal bureaucracy. Such a concentration of power in the hands of the bureaucracy is unwise and impractical. There are many reasons why a Federal official will choose not to bring enforcement action against a State or local government alleged to have violated Federal law.

Certainly, it represents a far greater strain on sensitive Federal/State relations for the Federal Government to begin administrative or litigative enforcement against State or local government than for individuals to continue to be permitted to seek judicial review of actions of local governments.

We believe that a fundamental precept of responsible and responsive government must be the assurance that the courts will be open to persons seeking redress. We see no justification in singling out Federal statutory programs and insulating them from judicial review.

If Congress believes there are specific programs for which judicial review would be inappropriate, it should address those statutes. If Congress believes there are specific abuses concerning 1983, it should address those specific problems. It should not act in an across-the-board manner without carefully examining the precise impact of such action.

Nothing about the American judicial system has been as important as its willingness to open its doors and provide a hearing for those who claim to be aggrieved. S. 584, we regret, has the potential of doing serious damage to that right, and we respectfully urge the members of the subcommittee and the Chair to reject the proposal.

S. 585

I would now like to turn briefly to S. 585, which would create a good-faith immunity for political subdivisions of the State in actions brought pursuant to section 1983.

The bill would apply not only to damage actions but also to claims asking for declaratory and injunctive relief. We have serious questions about the propriety of creating immunity for local governments that have violated the law with respect to injunctive relief.

We are not sure whether the creation of such immunity in injunctive cases is consistent with the intention of the Chair, especially in light of some of the opening comments, but we would urge the subcommittee to limit any legislation so as to not erect any immunity whatsoever with respect to suits for injunctive or declaratory relief.

With respect to actions for damages, our views in opposition to S. 585 are based on the somewhat simple belief that local governments should be liable to persons whose rights they violate. Rights without remedies are no rights at all.

Liability under 1983 accomplishes the objectives of government responsibility in two ways: First, it guarantees that persons who have been injured as the result of the violation of their rights will be compensated. Second, it deters future illegal action by putting a clear and certain price on it.

The liability of local government in 1983 actions is a limited one. Local governments are only liable for their official action, and the courts have introduced several important safeguards into the standard applied in 1983 cases.

First, the Supreme Court has specifically rejected the application of the doctrine of respondent superior under which a local government could be held liable for acts of its agents or employees.

Second, neither the *Monell* nor the *Owen* case limit in any way the personal immunities enjoyed by individual municipal officials and employees. Mayors and members of school boards continue to have a good-faith immunity, judges, prosecutors, and local legislators retain their absolute immunity.

Finally, neither of the Supreme Court's recent decisions in this area affects the determination of damages under 1983. An injured party must still be able to prove actual injury proximately caused by a defendant acting under color of State law. A plaintiff whose rights were violated but who cannot establish actual loss will not be entitled to anything more than nominal damages.

We know the argument is made that local governmental immunity is necessary or our cities and counties will be bankrupt. Although Owen is barely a year old, the already substantial body of law interpreting it offers no support for this claim.

To be sure, figures can be presented to you demonstrating the amount of damages that litigants have sought in actions against State and local officials, but as most lawyers know, the mere prayer for relief is far different than the ability to actually prevail in litigation. I do not think that allegations or claims for relief in complaints, often put there for public relations or publicity purposes, should influence this subcommittee in considering the proposal to adopt a qualified immunity for municipalities.

We see the assignment of liability that is possible under the law as it has presently been interpreted as an appropriate mechanism to allocate the costs to the community as a whole.

The Supreme Court in Owen carefully attempted to balance the needs of the injured person, the individual official, and the public. The individual who was injured is to be compensated. The individual officeholder is to be immune where he or she acted in good faith. The community as a whole is to provide compensation for the people who are injured by Government action which is found to be illegal.

In conclusion, we do not believe that convincing evidence has been put forward to this point to suggest the Supreme Court's decision in *Owen* v. *City of Independence* has put an undue strain on local government. While cities and counties may not like to be sued—certainly a universal and understandable feeling—that alone cannot justify the extraordinary step of erecting a good faith immunity and, in effect, putting their actions above the law.

We urge you to think carefully about this problem, and we respectfully suggest that there is no compelling need to act at the present time on this proposal.

Thank you very much.

Senator HATCH. Thank you. We appreciate the testimony of both you fine professors.

Professor Steinglass, without objection, we will insert your prepared text at this point.

[Material follows:]

STATEMENT OF
STEVEN H. STEINGLASS, ESQ.

on behalf of the
ACCESS TO JUSTICE PROJECT OF THE
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

before the
SUBCOMMITTEE ON THE CONSTITUTION
of the
SENATE COMMITTEE ON THE JUDICIARY

on S.584 and S.585,
TO AMEND 42 U.S.C. §1983

May 6, 1981

Mr. Chairman and distinguished members of the Subcommittee on the Constitution:

I want to thank you for the opportunity to testify before you today. I am an Associate Professor of Law at the Cleveland-Marshall College of Law, Cleveland State University, Cleveland, Ohio, and a member of the bars of the states of Wisconsin and Ohio. I appear today on behalf of the National Legal Aid and Defender Association (NLADA) and its Access to Justice Project, to testify on S.584 and S.585.

NLADA is a private, non-profit organization devoted to the support and development of quality legal services for the poor. Its membership consists of over 2700 organizations nationwide that provide representation to indigents in civil and criminal matters.

We oppose both S.584 and S.585, proposals that seriously limit the ability of victims of illegal government action to obtain redress. Although different in their approaches, both proposals have the effect of limiting the availability of private enforcement of federal rights under 42 U.S.C. §1983.

S.584 would limit the applicability of 42 U.S.C. §1983 by eliminating certain private causes of action to redress violations of federal statutory law. It would do this by including the phrase "providing for equal rights" to modify the reference to "and laws" in that statute.

S.585, on the other hand, would not eliminate any causes of of action from the reach of §1983. Rather, it would shield local governments that have violated federal statutes or the Constitution by providing them a qualified immunity. This would permit them to avoid accountability for the actions they have taken. In addition, as currently drafted, S.585 would extend to injunctive actions, thus permitting local governments involved in continuing illegal activity, albeit in good faith, to continue to violate the law.

Because these proposals approach the revision of §1983 in two entirely different ways, we will address them separately.

I. S.584

S.584 is a deceptively simple proposal that would have far-reaching consequences on the relationship between individuals and their government. It would cut off completely private enforcement of various federal statutes, regardless of how flagrant or intentional the violation of federal law might have been. This would be accomplished by amending 42 U.S.C. §1983 to limit the applicability of actions under that section to those based on laws "providing for equal rights."

A. Background - Maine v. Thiboutot

To understand the significance of this proposal, one must review §1983 as well as the 1980 decision of the United States Supreme Court in Maine v. Thiboutot, 448 U.S. ____, 100 S. Ct. 2502(1980). Section 1983 provides a cause of action for the violation, under color of state law, of "any rights, privileges or immunities secured by the constitution and laws"(emphasis added) of the United States. Unlike most civil rights statutes, §1983 confers no substantive rights. Rather, it provides a procedural vehicle to make possible the private enforcement of federal rights which have been violated under color of state law.

In Thiboutot, the Supreme Court affirmed a decision of the Supreme Judicial Court of Maine that the unmodified phrase "and laws" in §1983 extended to Title IV-A of the Social Security Act (Aid to Families with Dependent Children). Thiboutot involved a successful suit by public assistance recipients who claimed that state welfare officials had violated federal law and regulations in calculating their monthly AFDC grants.

This decision, and particularly Justice Powell's dissent, is apparently responsible for the attention that recently has been focused on the meaning and scope of §1983. In his opinion, Justice Powell suggested that somehow the common sense reading of "and laws" to include the Social Security Act constituted an expansion of §1983 and, hence, the federal statutes that could be enforced against state and local officials in actions under it. Despite clear precedent to the contrary, he argued that "and laws" really meant only laws providing for equal rights, and that since the Social Security Act has been held not to provide for equal rights, Thiboutot was wrongly decided.[1] He raised the spectre of state officials' being harassed by the resulting litigation as new cases are filed in the already overburdened courts.

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[1] In defining "and laws", Thiboutot resolved a longstanding confusion regarding the relationship between §1983 and its jurisdictional counterpart found at 28 U.S.C. §1343. The two were originally enacted together in §1 of the Civil Rights Act of 1871 but later separated in revisions of the Judicial Code. Section 1343 now provides jurisdiction over only those statutes "providing for equal rights" while §1983 extends to all "laws". The question arose whether the two should be construed to be parallel and, if so, whether §1983 or §1343 controlled. The Supreme Court ended the debate with two decisions. In Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979), the Court held that §1343 did not confer jurisdiction in §1983 claims seeking to enforce federal statutes not "providing for equal rights". Chapman raised, but did not resolve, the question of the scope of §1983. That was left for Thiboutot which, a year later, determined that §1983 applied to all "laws".

A careful analysis of the law governing §1983 negates the claims of the dissent. In limiting §1983 to actions based on statutes providing for equal rights, S.584 would seriously reduce the power of individual Americans vis-a-vis their government. For by removing the availability of a judicial forum, it would immunize illegal actions of state and local government no matter how intentional or knowing the violations of federal statutes might have been. The question is not whether state courts or federal courts will hear these cases. State and federal courts have concurrent jurisdiction over §1983 actions and it has become commonplace for litigants to file these cases in the state courts. Thiboutot, the very case that focused attention on the scope of §1983, was a state court case.[2] The question is, rather, whether any courts, state or federal, will be able to hear actions based on the alleged violations of certain federal statutory rights.

This issue is far from abstract. S.584 could close the courthouse doors to many of the following individuals who went to court as the only way to enforce federal law after federal officials were unable or unwilling to act on their behalf:

- Aged, blind and disabled applicants for welfare benefits in Illinois who were not provided benefits within required time periods. Edelman v. Jordan, 415 U.S. 651 (1974) (Title IV - A of the Social Security Act)

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[2] As the Supreme Court noted in Thiboutot, 100 S.Ct., at 2503 n.1, earlier in the term it had made clear that state courts could entertain §1983 questions. See Martinez v. California, 100 S.Ct. 553, 558 n.7 (1980).

- Migrant farmworkers in Florida who were denied appropriate services by the state employment service. Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969)(Wagner-Peyser Act);
- New York residents who were denied essential medical care under Medicaid. Bass v. Rockefeller, 331 F.Supp. 945 (S.D.N.Y.), remanded for dismissal as moot, 464 F.2d 1300 (2d Cir. 1971)(Title XIX of the SSA);
- Unemployed workers in California who were denied timely payment of unemployment compensation benefits. California Dep't of Human Resources Development v. Iowa, 402 U.S. 121 (1971);
- Illinois families who were denied foster care benefits because they were related to foster children. Miller v. Youakim, 440 U.S. 125 (1979).

All these people felt their statutory rights were violated by state or local officials and that federal officials had not taken effective action to enforce federal law. They all sought judicial relief under §1983, which enabled them to maintain a private action to enforce their federal statutory rights. And they all had their day in court and the opportunity to be heard by the judicial branch of government when they felt the executive branch had not acted to secure rights granted by the legislative branch.

A careful review of the background of §1983 and developments before and since the Thiboutot decision makes it clear that no significant change has taken place with respect to the scope of §1983. The predictions made by Justice Powell have not materialized and are unlikely to.

B. Federal Statutory Rights Must Not Be Immunized From Judicial Review

For the following reasons, we oppose S.584.

First, *Thiboutot* is not a departure from existing law. To be sure, this case represents the first time the Supreme Court squarely addressed the phrase "and laws" in §1983 and reached a definitive conclusion as to its meaning. However, §1983 actions to enforce federal statutes not providing for equal rights have been a feature of §1983 litigation for many years.

More than thirty years ago, Judge Learned Hand found a cause of action authorized by §1983 to protect the employment rights of a public school teacher whose absences were caused by federal jury service. *Bomar v. Keyes*, 162 F.2d 136, 139 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947). Since the landmark decision in *Monroe v. Pape*, 365 U.S. 167 (1961), statutorily-based §1983 actions have been a small but significant part of §1983 litigation.[3]

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[3] Prior to *Thiboutot*, most courts involved in statutory §1983 actions including the Supreme Court, simply assumed the statute's applicability to enforce statutes not dealing with equal rights, and did not address in depth the issue of the scope of the phrase "and laws." See, e.g., *King v. Smith*, 392 U.S. 309 (1968); *Rosado v. Wyman*, 397 U.S. 397 (1970); *Dandridge v. Williams*, 397 U.S. 471 (1970); *Lewis v. Martin*, 397 U.S. 552 (1970); *California Dep't of Human Resources Development v. Java*, 402 U.S. 121 (1971); *Townsend v. Swank*, 404 U.S. 282 (1971); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *New York State Dep't of Social Services v. Dublino*, 413 U.S. 405 (1973); *Hagans v. Lavine*, 415 U.S. 528 (1974); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Shea v. Vialpando*, 416 U.S. 251 (1974); *Van Lare v. Hurley*, 421 U.S. 338 (1975); *Philbrook v. Glodgett*, 421 U.S. 707 (1975); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977); *Quern v. Mandley*, 436 U.S. 725 (1978); *Miller v. Youakim*, 440 U.S. 125 (1979).

(cont'd)

Because *Thiboutot* only clarifies that which most litigants and lower courts knew - namely that §1983 authorized a cause of action to enforce federal statutory rights - and because of the importance of private enforcement in this area, we welcome the Court's decision. However, because *Thiboutot* is not a departure, any legislation to overturn it would also affect those other statutes that have been enforced through §1983. Thus, the impact of S.584 goes far beyond the provisions of the Social Security Act before the Court in *Thiboutot*.

Second, much of the concern about the implications of *Thiboutot* is based on an incorrect reading of the decision. The phrase "and laws" in §1983, even when given its literal construction, does not by itself permit private litigation to enforce alleged violations of federal statutory law. Such a construction is necessary but is not sufficient to permit private enforcement. Thus, *Thiboutot* only addresses the first step in determining whether private enforcement is available. The second step involves an inquiry concerning the specific federal statute at issue. Where Congress has expressed

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(f.n.3, cont'd)

However, "... nearly every lower court that confronted the issue expressly held the §1983 cause of action to encompass purely statutory claims." Note, The Supreme Court, 1979 Term, 96 HARV. L. REV. 227 n.36 (1980). See, *e.g.*, *Tongol v. Usery*, 601 F.2d 1091, 1098-100 (9th Cir. 1979)(Emergency Unemployment Compensation Act of 1974, Pub. L. No. 93-572; *Chase v. McMasters*, 573 F.2d 1011, 1017 (8th Cir.)(25 U.S.C. §465 (1976); *cert. denied*, 439 U.S. 965 (1978); *Blue v. Craig*, 505 F.2d 830, 834-36 (4th Cir. 1974)(Medicaid); *Gomez v. Florida State Employment Serv.*, 417 F.2d 569, 579 (5th Cir. 1969)(Wagner-Peyser Act, 29 U.S.C. §§49-49k (1976)); *Naughton v. Bevilacqua*, 458 F.Supp. 610, 615 (D.R.I. 1978)(Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, *aff'd on other grounds*, 605 F. 2d 586 (1st Cir. 1979); *La Raza Unida v. Volpe*, 440 F.Supp. 904, 908-10 (N.D. Cal. 1977)(Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§4625, 4630 (1976)).

its intention to preclude private enforcement, that decision will govern. Thus, as Justice Powell acknowledged in *Thiboutot*, §1983 will not authorize a private action "... in cases where the government statutes provide an exclusive remedy for violation of its terms." *Thiboutot*, 100 S.Ct. at 2513 n.11.

In many ways, §1983 should be looked at as the state and local analogue to the Administrative Procedure Act, 5 U.S.C. §701 *et seq.*, which authorizes judicial review of actions of federal agencies. Like the APA, §1983 should be viewed as presuming the availability of judicial review. Where Congress is silent on the availability of judicial review, it will be presumed available. However, where Congress precludes such judicial review, it will not be permitted despite the language of the APA or §1983. *Cf*. *Hart* and *Wechsler*, The Federal Courts and the Federal System - 1981 Supplement 237 (1981).[4]

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[4] A review of recent lower court decisions after *Thiboutot* reveals that courts are carefully reviewing federal statutes to determine whether they will be the subject of private enforcement under §1983. *Compare* *Lynch v. Maher*, 507 F.Supp. 1268 (D. Conn. February 4, 1981)(§1983 available to enforce Developmentally Disabled Assistance and Bill of Rights Act); *Kennecott Corp. v. Smith*, 637 F.2d 181, 186 n.5 (3rd. Cir. 1980)(§1983 action available to statutory rights secured by the Williams Act, 15 U.S.C. §78m(d)(e), 78n(d)-(f), and SEC Rules) holding statutes to be subject to private enforcement, *with* *First Nat'l Bank of Omaha v. Marquette Nat'l Bank*, 636 F.2d 195 (8th Cir.)(no §1983 action to enforce the National Banking Act), *cert. denied*, 49 U.S.L.W. 3743 (U.S. April 6, 1981); *CETA Workers Action Committee v. City of New York*, ____ F.2d ____ (2d Cir. February 27, 1981)(no §1983 action to enforce the Comprehensive Employment and Training Act) holding other statutes not to be the subject of private enforcement. In fact, as recently as two weeks ago the Supreme Court addressed this issue in the context of the Developmentally Disabled Assistance and Bill of Rights Act, U.S.C. §§6010, and specifically left open the question of private enforcement of this Act under §1983. *Pennhurst State School and Hospital v. Halderman*, 49 U.S.L.W. 4363, 4370 n.21 (U.S. April 20, 1981). See also, *Southeastern Community College v. Davis*, 442 U.S. 397, 404, n.5 (1979), leaving open whether §504 of the Rehabilitation Act of 1973 can be enforced in a private action under §1983.

Thiboutot does not by itself result in an expansion of federal statutes that may be privately enforced through §1983 and those who fear that the decision authorizes private enforcement of all federal statutes are mistaken.

Third, legislation at this time to amend §1983 to limit the phrase "and laws" is inadvisable because the law is unclear and in a state of flux. As illustrated above, courts are reaching varying conclusions concerning private enforcement of federal statutes that are within §1983. Because of this uncertainty, it is not possible to determine precisely the impact that S.584 would have. Even with the passage of S.584, some courts would imply the availability of certain private actions. Consequently, legislation at this time would not clarify the law but would lead to serious confusion as to whether private enforcement was still available. Therefore, Congress should not even consider S.584 unless it is willing simultaneously to undertake a statute-by-statute examination of each and every statute subject to private enforcement against state or local officials.

Fourth, predictions that have been made concerning the implications of Thiboutot are without basis. As Justice Powell noted, the number of civil rights filings in federal court in non-prisoner cases has remained relatively constant since 1977. Thiboutot, 100 S.Ct. at 2515, n.16. We are not aware of any statistics on the number of statutory §1983 cases that are being filed. However, we do not believe the number has been or is likely to become a significant burden on the federal or state courts. The statistics gathered by the Administrator of the United States Courts support this. In the 1980 Annual Report of the Director, it is reported that in the year ending June 30, 1980 there were only 170 welfare cases filed.[5] Thus, twelve years after King v. Smith, 392 U.S. 309 (1968), in which the Court first permitted a §1983 action to enforce Title IV-A of the Social Security Act, an average of less than one-half case per federal judge per year is being filed. This hardly suggests the existence of a burden on the Court that requires legislative action.

Fifth, we have not seen and are not aware of any "harassment" that has taken place with respect to statutorily-based §1983 actions. In any event, the federal courts retain appropriate tools to deal with frivolous actions, including the awarding of attorneys' fees against plaintiffs and attorneys who have commenced or maintained such litigation. Cf. Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978), and Roadway Express, Inc. v. Piper, 100 S.Ct. 2455 (1980). Nor is there any suggestion that abuses in this area exceed those in other areas. Moreover, individual state and local officials are still protected by the doctrines of absolute or qualified immunity; the states still may rely upon the shield of the Eleventh Amendment to protect their fisc; and finally, municipalities may only be subject to damages under §1983 where they have taken some official action, as the doctrine of respondeat superior has not been made a basis for liability under §1983. Monell v. New York Department of Social Services, 436 U.S. 658 (1978). See discussion below.

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[5] Annual Report, A-16 Table C 2. This excludes the 42 cases filed against federal defendants, since 42 U.S.C. §1983 is not available in such cases.

Sixth, the limitation on statutory §1983 actions will not result in such disputes' being kept out of court. The proposed amendment to §1983 does not in any way limit the range of constitutional issues that plaintiffs may raise, and an unintended but inevitable result of the elimination of private enforcement of federal statutes will be an increase in efforts to frame the same dispute in constitutional terms. In addition, suits against federal officials who have failed to enforce statutory rights in are also likely to increase. Thus, passage of the proposal will probably not reduce, and may even expand, the volume of litigation. It will certainly result in unnecessary constitutional decisions.

C. Importance of Private Enforcement

We view the decision in Thiboutot as correct on both legal and policy grounds and do not believe it will have a significant impact on either the workload of the judiciary or on the relationship between local officials and the federal programs they administer.

We suggest no disrespect for the ability, commitment or fidelity to the law of members of the federal bureaucracy when we suggest that it is inappropriate to give them exclusive responsibility for enforcing federal law. It would be surprising, indeed, if this Congress, committed as it is to helping get government off the backs of the prople, denied the American people the ability to enforce privately their rights. S.584 will say to citizens that although they have been injured by local government action, their only recourse is to complain to the federal bureaucracy. Such a concentration of power in the hands of the bureaucrats is unwise and impractical. There may be many reasons why a federal official chooses not to begin enforcement actions against a state or local government alleged to have violated federal law - not the least of which is that often the only administrative remedy available is the draconian one of the complete defunding of an important program. Certainly, it represents a far greater strain on sensitive federal-state relations for the federal government to begin administrative or litigative enforcement against local government than for individuals to continue to be permitted to seek judicial review of actions of local government.

NLADA is composed of organizations that provide legal services to low-income individuals in criminal and civil areas. For its members and their clients, the availability of a judicial forum to enforce federal law is of great importance. However, the principle we advocate has far broader applicability. Whether one talks about the statutory rights of persons in public benfit programs, or ranchers, farmers, or businessmen in other federal programs, a fundamental check on the operation of the government - and one we believe must be zealously protected - is the ability of the citizenry to seek judicial review of governmental action. Certainly, it would be a miscarriage of justice if a municipality's violation of the statutory right of an elderly nursing home patient to continued health care was immune from judicial review.

A fundamental precept of responsive government must be the assurance that the courts will be open to persons seeking redress. There is no justification in singling out federal statutory programs and insulating them from judicial review. If Congress believes there are specific programs for which judicial review would be inappropriate, it should address those statutes specifically. It should not act in an across-the-board manner without carefully examining the precise result of its actions.

Because the impact of Thiboutot has been widely misconceived, because the area is in a state of flux, and because legislatively cutting off private enforcement represents the antithesis of the direction in which Congress should go to assure accountable government, we oppose S.584. Nothing about the American judicial system has been as important as its willingness to open its door to provide a hearing for those who claim to be aggrieved. S.584 has the potential of doing serious damage to the rights of individuals in our society and we urge you to reject it.

II. S. 585

I would now like to turn to S. 585, which would create a good faith immunity for political subdivisions of a state in actions brought pursuant to 42 U.S.C. §1983. The bill, which would reverse the recent Supreme Court decision in Owen v. City of Independence ___ U.S. ___(1980), would apply not only to damage actions but to claims asking only for declaratory or injunctive relief as well. Because the limited liability announced by the Supreme Court in Owen and Monell v. Department of Social Services, 436 U.S. 659 (1978) is mandated by important policy considerations, and because there is no evidence that the fiscal integrity of local governments is being compromised, we oppose this bill.

Our views are based on the straightforward belief that local governments should be liable to persons whose rights they violate. Rights without remedies are not rights at all. As the Owen Court observed:

> "How uniquely amiss it would be...if the government itself - 'the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and setting of worthy norms and goals for social conduct' - were permitted to disavow liability and the injury it has begotten.

Liability under §1983 accomplishes the objectives of government responsibility in two ways. First, it guarantees that persons who have been injured as the result of the violation of their rights by a municipality will be compensated. Second, it deters future illegal action by putting a clear and certain price on it.

The liability announced in Monell and Owen is a limited one. Local governments are liable only for their official actions. In addition, three important safeguards have been built into the standard. First, the Court specifically rejected any application of the doctrine of respondeat superior under which a local government could be held vicariously liable for the acts of its agents or employees. For example, a city cannot be held liable if an individual policeman conducts an illegal search and seizure or if a prison guard, acting on his own, violates the civil rights of a prisoner.[6]

Second, neither Monell nor Owen limits in any way the personal immunities enjoyed by municipal officials and employees under §1983. Mayors and school board members will continue to have a good faith immunity while judges, prosecutors and local legislators will retain their absolute immunity.[7]

Finally, neither decision affects the determination of damages under §1983. An injured party must still be able to prove actual injury proximately caused by a defendant acting under color of state law.[8] A plaintiff whose rights were violated but who cannot establish actual loss, will only be awarded nominal damages.[9]

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[6] See, e.g., Singleton v. City of New York, 632 F.2d 185 (2d Cir. 1980); Mooney v. City of Holland, 490 F.Supp. 188 (W.D. Mich. 1980).

[7] See, Pierson v. Ray, 386 U.S. 547 (1967) (judicial immunity); Tenney v. Brandhove, 341 U.S. 367 (1951)(legislative immunity); Imbler v. Pachtman, 424 U.S. 409(1976)(prosecutorial immunity); Wood v. Strickland, 420 U.S. 308 (1975)(good faith immunity for school board members); Procunier v. Navarette, 434 U.S. 555 (1978)(good faith immunity for prison officials and officers).

[8] Martinez v. California, 444 U.S. 277 (1980).

[9] Carey v. Piphus, 435 U.S. 247 (1978).

Punitive damages are not available.[10]

The argument most often given in favor of a local governmental immunity is that any rule to the contrary will bankrupt our cities and counties. Although Owen is barely a year old, the already substantial body of law interpreting it offers no support to this claim. The caselaw clearly demonstrates that the lower courts are applying Owen in a careful and narrow manner. They are finding liability only where it can be clearly demonstrated that the complained of activity not only violates federal law but was taken pursuant to an official policy of the local government. This most usually takes the form of a city ordinance or other official declaration.[11] Even where there is a finding of liability, the courts are assessing only those damages which can be clearly proved.[12] There have not been many awards thus far, and they have been modest in scope.

Critics of Owen further contend that local government should not be liable at all if it acted in good faith; that is if it acted without malice or where there was an honest confusion about the governing law. This argument assumes that a finding of liability is akin to finding the local government "guilty" of some form of misconduct. To the contrary, the assignment of liability is more appropriately seen as a mechanism to justly allocate the costs of an injury.

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[10] Valcourt v. Hyland, 503 F.Supp. 630 (D. Mass. 1980).

[11] See cases cites in f.n.6. See also, Walters v. City of Ocean Springs, 626 F.2d 1317 (5th Cir. 1980); Kindem v. City of Alameda , 502 F.Supp. 1108 (N.D. Cal. 1980); Hassan v. Town of East Hampton, 500 F.Supp. 1034 (E.D.N.Y. 1980).

[12] In Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980), for example, the Court found that defendants had violated the plaintiff's First Amendment rights. However, because there was no proof of actual injury, the Court awarded nominal damages not to exceed one dollar.

Assume, for example, a realistic hypothetical situation. A municipality owns a power company which terminates customers from service one winter in a manner later determined to violate due process. Some customers left without heat fall sick, incur medical bills and lose time at work. Others have the pipes freeze in their homes and have to make expensive repairs. It later turns out that some of these customers were not delinquent at all in their bills and that a bookkeeping error had caused the entire problem. We believe that it would be a manifest injustice to force these individuals to bear the costs caused by the municipality's actions. Yet this would be the result of S.585.

In arriving at its formulation of municipal liability, the Supreme Court carefully balanced the needs of the injured person, the individual officer or employee and the public:

> "We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the §1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to

> bear only the costs of injury inflicted by the 'execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.'"

We find the Court's reasoning compelling and urge the Committee to consider it carefully.

If the Committee, however, determines that a good faith immunity should be invoked under §1983, we urge it to do so only for damages actions. Local governments should continue to be liable in actions for injunctive or declaratory relief. No reason has been advanced to insulate municipalities from these orders and we suggest that there is none. Even states, which are immune from monetary relief under the Eleventh Amendment, are subject to prospective equitable relief. It would be a grave injustice to immunize local governments from orders setting forth what the law is and ordering them to comply with it.

In conclusion, there is no evidence that the Supreme Court's decision in Owen v. City of Independence is putting an undue strain on local governments. While cities and counties may not like to be sued - a universal and understandable feeling - this alone cannot justify the extraordinary step of putting them above the law. Nor can a handful of awards to compensate injured persons for actual damages they have suffered. If the situation changes over the next few years, it would be appropriate for the Committee to re-examine the problem. There is no reason to act now.

Senator HATCH. Let me start with you, Professor Steinglass. Do you feel that the effect of S. 584 and S. 585 would undermine constitutional or civil rights other than when the municipality acted in good faith and neither knew nor should have known that they were violating the Constitution?

Mr. STEINGLASS. S. 584 would not have any effect with respect to constitutional rights because, as you are aware, it preserves the action in constitutional cases. So, S. 584 would not in any way lessen constitutional rights.

I think the problem with respect to S. 585 is different—and here we must talk about how things really are. Under S. 585, in order for an individual injured by illegal Government action to recover they would have to show either subjective bad faith or that the municipality or the officials in the municipality knew or should have known that the action was illegal. It seems to me that is a very, very difficult burden to place on a plaintiff.

While there is a certain superficial attractiveness to saying that anyone who acts in good faith should not be held liable, the reality of that is to largely immunize local government for actions that they take. So I do believe that constitutional rights would be adversely affected because of the difficulty of meeting that burden.

It is not very difficult for a lawyer to go before a court and say that even though there is a lot of law in this area, the Supreme Court has never definitively resolved the issue, and therefore the municipal official cannot be said to have known that what he or she was doing was illegal. With respect to proving subjective bad faith, this may be done from time to time, but by and large I do not think local officials act with bad faith, and I do not think litigants would be able to show bad faith very often.

Senator HATCH. If Congress were to determine that section 1983 litigation is creating an unjustifiable burden on municipalities, what course do you feel it would be best to pursue to reduce that burden without comprising individual constitutional or civil rights?

Mr. STEINGLASS. Initially, what I would say is that actions based on Federal statutes should be given a great deal of respect and should not be cut away or reduced.

If Congress was to find that 1983 actions were, in fact, bankrupting the cities or, in fact, presenting intolerable burdens on the ability of local governments to do their jobs, then I think there would be a stronger argument for legislation like S. 585 with respect to damage actions. I think S. 585 goes further than one need go to protect municipalities.

It is difficult to come up with alternative language in terms of an immunity that might provide more protection than is presently there but not creating the full good faith immunity that seems implicit in S. 585.

But I think that, as a policy matter, if Congress was to find there was an intolerable burden, not just in theory but in practice, you might want to look at something like S. 585 but you would have to work on the language because it is much too broad an immunity in damage actions, and, as indicated earlier, I think it is wholly inappropriate in injunctive actions, although, again, we are not sure it is your intent to apply it in injunctive cases.

Senator HATCH. How do you feel the awarding of attorney's fees in 1983 is affecting litigation in that area, and would you recommend any change in the awarding of attorney's fees?

Mr. STEINGLASS. I think the availability of attorney's fees has clearly affected litigation. What it has done is enabled many persons who would not otherwise be able to retain attorneys to obtain them, and I think that is an important and healthy development.

I think it is far too early to make a judgment as to whether the overall impact of the availability of attorney's fees is a good or a bad thing. Our bias certainly is that it is a good thing because it enables people who might not otherwise have access to lawyers to first get the keys to the courthouse door. But I think we need a lot more evidence and information before we can make any conclusion as to that.

Senator HATCH. Thank you.

Professor Abernathy, some groups have claimed that these bills, S. 584 and S. 585, represent a step backward for civil rights advances that have been made. In your opinion, are these fears justified?

Mr. ABERNATHY. They represent a step back from where we are today. I am not sure they represent a step back from where we were a few years ago.

I suggested earlier that if a change could be made in S. 584, in particular, to allow for Social Security Act and other beneficiary-type cases to be brought we would really be preserving the status quo before *Maine* was decided. That, to me, sounds like a pretty good place to be.

S. 585 is a little bit harder to predict. One of the problems we have always had in the civil rights area is that individual officials who have been sued are often judgment-proof, so that even when one obtains a $500,000 verdict—that I have only heard of in one case—there is no way to actually recover more than $5,000 or $10,000 from an individual employee of the State. So S. 585 would limit the recoveries which are available now under *Owen*.

Senator HATCH. Do you feel the *Cort* v. *Ash* test the Court has developed to determine the number of implied rights of action in Congress silent statutes is preferable to assuming that any statute has an automatic cause of action? If so, what arguments do you feel support this decision?

Mr. ABERNATHY. I do support the use of the *Cort* test rather than reading the "and laws" language to apply to all Federal statutes that regulate State officials.

This is primarily a statutory interpretation problem. Congress passed these statutes, and Congress is the one to decide whether all of them should be vindicated in private actions in Federal court or not.

It seems to me, looking back over the history of these statutes in the last 15 years, Congress remained silent on whether it wanted them to be enforced by private actions in Federal court, and that is the reason we have the *Cort* v. *Ash* test.

One of the things that bothers me about the *Maine* decision is that if it is read broadly to include even those statutes for which the Court has not implied a private right of action under *Cort*, then it does too much—it attributes more to Congress than Congress intended.

Senator HATCH. Senator DeConcini asked me to ask you this question, Professor Steinglass. You noted that only one-half case per Federal district court judge has been filed in the less than 1 year since Thiboutot. Since we have over 500 district court judges, that means over 250 cases have been filed already. Is this an ominous sign that a greater flood of them are coming?

And, I might add, as of February 1981, at least $4 billion in claims have been filed against cities, as a result of Thiboutot I guess.

Mr. STEINGLASS. My statement was that since 1968 when the Supreme Court decided *King* v. *Smith,* which was the first case that expressly allowed a 1983 action to enforce a statutory claim, 12 or 13 years have elapsed, and now we still only see less than one-half case per Federal judge. I think that is the date to which I was referring.

Certainly for the last 12 or 13 years, litigants involved in social security benefit cases have assumed that 1983 was available to authorize for cause of action.

As far as the $4 billion figure to which you just referred is concerned, I do not believe there is any suggestion in the testimony that I saw from the people who are testifying following us that those cases were statutory cases. My understanding is that they were talking generally about 1983 litigation and were not restricting their figures or their surveys to statutory cases. They will correct me, I am sure, if I am wrong.

Frankly, I cannot think of any case—and I am sure they will correct me also if I am wrong—in which a municipality has been held liable for damages for violations of a Federal statutory right. Obviously, such cases would be more likely to have come up in the last couple of years, but I am not aware of cases like that, and I do not think that is a real problem.

Senator HATCH. Thank you.

We appreciate the efforts both of you have put forward. Of course, as you know, these bills are controversial bills, and we will really pay attention to many of the things that you have said—in fact, everything you have said. I think your testimony has been very helpful to the Senate on this matter.

Thank you for coming, and we appreciate the effort.

Mr. ABERNATHY. Thank you, Mr. Chairman.

Mr. STEINGLASS. Thank you.

Senator HATCH. We will now hear from a panel of city attorneys who are representing the National Institute of Muncipal Law Officers. These attorneys have a special expertise on this subject since they defend municipalities in section 1983 litigation.

NIMLO is represented by Roy D. Bates, city attorney, from Columbia, S.C.; Marvin J. Glink, corporation counsel of Naperville, Ill.; and Roger F. Cutler, city attorney, Salt Lake City, Utah—from my own hometown.

We are happy to have you all here. If you would come up and each of you take one of these microphones, we would appreciate it. We are happy to welcome you here.

Roger, we are certainly appreciative that you would come all the way back from Salt Lake City to be with us today.

Let us start with Mr. Bates, then Mr. Cutler, and then finally we will end up with Mr. Glink.

STATEMENT OF ROY D. BATES, CITY ATTORNEY, COLUMBIA, S.C., REPRESENTING THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

Mr. **Bates**. Thank you, Mr. Chairman.

We appreciate the opportunity to appear before you today and, hopefully, to give you some information that will be of real value to you and the subcommittee in your deliberations.

With your permission, we would like to divide our presentation into three parts. I would like to make some general comments concerning the impact on municipalities from the standpoint of litigation and the cost, touch briefly on the good faith defense aspect of the *Owen* case, and then ask Mr. Cutler to talk about the problems under the *Maine* case—I cannot pronounce Thiboutot, so I will call it the *Maine* case—and then ask Mr. Glink to talk about the attorney's fees aspect of it, if that is acceptable.

Senator **Hatch**. That will be fine.

NIMLO EFFORTS

Mr. **Bates**. We are here on behalf of NIMLO, which is the National Institute of Muncipal Law Officers, representing some 1,600-member local governments. It is a nonprofit, nonpartisan, factfinding organization, and it is most unusual for representatives of NIMLO to appear before a congressional committee. It has been approximately 15 years since this has happened, and we think that this shows in some measure the importance that is attached to this issue by local government attorneys all over the Nation.

We are here to support S. 584 and S. 585. However, we want to make it plain that we are not against the energetic enforcement of civil rights. As you indicated in your opening statement, we share that view.

What we are interested in is trying to strike a fair balance between the rights of private citizens and the paramount public interest in preserving the integrity of local governments.

In this connection, we have collected some information. We have some documents at this time that we would like to offer for the record. We have already furnished, I believe, to Mr. Ormsby, the prepared statement of this panel.

Senator **Hatch**. Without objection, your prepared statement will be inserted in the record and documents that you submit with it.

Mr. **Bates**. All right, sir. I would like to briefly identify these documents and tell what they deal with, but I will not read from them or go into them in any length.

The first one is a report prepared by a NIMLO committee, of which I am the chairman, concerning the need for amendment to section 1983, and as a part of this report we have included information on the number of cases and the dollar amount of pending claims against municipalities from all over the country. This shows the impact—and I will get into the actual figures a little bit later—

as we are able to determine it, just from a representative sampling of municipalities.

The second document is a partial response to a questionnaire that NIMLO sent out to its members asking for information related to frivolous claims or inequitable fee awards. This document gives in summary fashion some clear examples of frivolous claims, and attached to it are a number of exhibits giving more detail—copies of pleadings, and things of this nature.

So it can be understood that we are here today to furnish hard facts to this subcommittee. We are not asking you to deal in speculation or something that has come from someone's imagination.

Senator HATCH. That is a pleasant change from what we usually deal in. [Laughter.]

Mr. BATES. The third document is a paper prepared by Mr. Glink entitled, "Setting the Depths of the Municipal Pocket: A proposal for the reevaluation of municipal liability under sections 1983 and 1988 after Monell, Owen, and Thiboutot." We believe that this will give some insight into problems particularly related to attorney's fees, and Mr. Glink will get into that in his presentation in more detail.

We ask that those be made a part of the record.

In that regard, we are still receiving daily results from this questionnaire, and if we may be permitted to furnish to the subcommittee as these things come in, as long as the record is open, additional information that we get, we would appreciate that opportunity.

Senator HATCH. That will be fine. We will look forward to receiving additional information.

Mr. BATES. Thank you, sir.

NATIONAL AWARENESS

We believe that we can demonstrate to the subcommittee that there is a nationwide call for action in this area. In April of this year, NIMLO had a seminar which was oriented around this subject, and it was the most well-attended seminar we have ever had. City attorneys turned out in unbelievable numbers to discuss this subject, and at that conference there was a resolution adopted, which is in our report, by the NIMLO board, supporting the concepts which are addressed in the two bills before this subcommittee.

In addition, the National League of Cities and the National Association of Counties have recently adopted a resolution supporting action in this area, and that information or copies of those resolutions are included in our prepared remarks.

I come from a State that has a lot of small towns in it. It is primarily a rural State. The largest city in it is less than 100,000. Most of our towns are under 1,000 in population. So it was important to me to know what kind of impact we could expect on the smaller community.

So, in the last few months, I have dealt with members of the Municipal Association board of directors, mayors, elected officials, and members of the local government committee of our State bar association, law students at our university, the Statewide Organization of Municipal & Public Engineers, and the Statewide Organization of Building Officials & Fire Inspectors.

When they are made aware of the things that have happened in the last year, after Owen and Thiboutot, those people are—to put it mildly—terribly afraid of the future. And I think they have reason to be because of the things we can demonstrate in this record.

They understand that perhaps they have some qualified immunity, but they are concerned about the welfare of the organizations that they work for and the local governments that pay their salaries, and the impact that their actions are going to have when that municipality is unable to plead the good faith of that employee as a defense.

As an example, I recently had a case in the city of Columbia involving a building inspector who was requested by FHA to provide a statement that there were no building code violations present in a particular property before FHA would approve a loan on that property.

This inspection was made for the benefit of FHA. No copy was given to the owner. It was not represented to the owner as being anything that he could rely upon.

After the loan closed and the owner moved in, he decided that he was unhappy with some of the conditions in the building. In the loan packet furnished to his attorney, of course, was a certification from the building inspector. He seized upon that and said: "Well, if they made an inspection, they owed me a duty to make certain that everything was in proper order, and I don't think it is. I think I have a lawsuit."

We have a 1983 action arising out of those circumstances right now.

We have another situation where the city furnishes water services to residents outside of the corporate limits. Citizens in a certain subdivision became unhappy with the condition of their streets. The city has no jurisdiction over those streets and no responsibility. All it does is run its water lines in those streets.

We were sued for $2 million on the basis that we were a joint venturer—whatever that means—with the owner of the streets. They could not determine whether it was the adjoining county or the developer, so we were all sued.

These are the kinds of claims that we are getting at the local level that we do not understand. They must be for the purpose of harassment or to test the ability to recover something which is not deserved, and we are put to the trouble and expense of defending these claims, even though, in both of the cases that I have just mentioned, we expect to win.

FINANCIAL IMPACT

The financial impact is a multifaceted aspect of this thing. This survey shows that there are pending claims right now in the sampling of 215 municipalities over this Nation—$4.8 billion in 1983 claims. Forty-six of these municipalities report over $1 billion in claims for punitive damages under 1983.

There are some 39,000 municipalities in this country and something over 80,000 units of local government of all kinds. If you use accepted statistical analysis and extend these figures, assuming a conservative recovery rate of only 1 percent of the amount claimed, this means that we have a potential over the Nation of $10 billion recovery in 1983 claims. We think that is a conservative analysis of it.

In addition, you have got the consideration of punitive damages in some instances. Attorney's fees are not included in these figures, and the courts have been very liberal, as Mr. Glink will explain, in granting attorney's fees in cases even where the municipality wins its suit.

The cost of defense alone can force a small town into a settlement, whether there is merit to the claim or not. Delays in projects—when litigation comes as a result of the performance of some public work, frequently the project must be delayed, with additional cost of construction because of inflation. And equitable remedies which do not involve monetary awards but do involve some action that must be taken can cost money. These figures do not include any of those things.

Last, it does not include any consideration for the most precious commodity that any of us has, and that is the time that must be used in handling these matters.

So the problem becomes one of risk management. How do you plan for the kinds of figures that we are dealing with here? How do you buy insurance for it? Insurance is becoming increasingly harder for public bodies to buy in any field, and I submit to you that it is going to be virtually impossible, after the flood of cases that we are seeing the tip of the iceberg on, to get insurance coverage that will be meaningful and affordable, particularly to smaller communities.

A small town can almost be wiped out just by the bringing of one suit which it must defend, even though it may win.

I have an example of a case that I have been asked to handle for a town of about 300 in population. It arose out of a traffic violation. There was no allegation of any excessive force, no allegation of abuse of the defendant, or anything else. It was a simple allegation that, because the defendant won his case before the judge and was acquitted, he had a civil rights action against the town.

If the town cannot plead the good faith of the officer who made that charge, we not only have a cost of defense but a real possibility of a recovery of an award which is totally unfair. Such a case can literally double the operating budget of a town 300 in population.

NEED FOR GOOD FAITH DEFENSE

As I said, we are here to support S. 584 and S. 585, and we think that S. 585 addresses the real need produced by the *Owen* case. It answers the need for a good faith defense.

It makes no sense to us or to the people that we have talked to that an employee or an official of a local government can plead good faith in his own defense and yet that government which must act only through employees and officers cannot plead the same defense.

We are really talking about the impact on taxpayers because that is what local government is made of. So we have people acting in a corporate capacity, and because of that they are unable to plead this good-faith defense.

I had a suit brought against the city of Columbia in the last 2 months which is a graphic example of how lack of a good-faith defense is going to hamper law enforcement. Of course, this has been a fertile field for many years for 1983 actions.

It is a policy of the city of Columbia to send a law enforcement officer to aid law enforcement officers from other jurisdictions upon request from the appropriate officials. We recently received such a request by radio from officers from another jurisdiction who were in hot pursuit.

They chased the vehicle into our jurisdiction. Our officers assisted in stopping the vehicle. They did not actually participate in any search or arrest, but they were present on the scene and observed it.

As it turned out, the officers from the other jurisdiction were in pursuit of the wrong vehicle, and the people in it had done nothing wrong. There was no allegation of any excessive force—just a simple mistake.

The city of Columbia has been sued in a 1983 action as a result of this and has no way to plead a good-faith defense, and yet I submit to you I can think of no clearer example of a good-faith situation. We think the principle of federalism suffers greatly unless something is done in this area.

It is interesting to note that Federal officials are not subject to 1983 actions for their individual actions, and yet local governments applying Federal laws are made, for all practical purposes, absolute insurers in this situation. It makes for an untenable situation.

We stand ready to furnish to this subcommittee at any time any additional information we can get that might be of help to you, but we disagree with the prior statements that action is not needed now. We think that it is needed now.

Thank you very much.

Senator HATCH. Thank you.

[The statement submitted by the panel on behalf of NIMLO with attachments follow:]

SENATE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON THE CONSTITUTION
May 6, 1981

PREPARED STATEMENT ON BEHALF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

BY
ROY D. BATES, CITY ATTORNEY, COLUMBIA, SOUTH CAROLINA;
ROGER F. CUTLER, CITY ATTORNEY, SALT LAKE CITY, UTAH; and
MARVIN J. GLINK, CORPORATION COUNSEL, NAPERVILLE, ILLINOIS

INTRODUCTION

On behalf of the approximately 1600 local governments comprising the membership of the National Institute of Municipal Law Officers (NIMLO), we thank the Committee for the opportunity to appear at these hearings in support of S.584 and S.585 to amend 42 U.S.C. §1983, and to urge the Committee to address the issue of attorneys' fees as well.

We appear today in direct response to the Supreme Court's admonition that any changes to §1983, as interpreted by the courts, must come from the Congress.[1] We believe that events since 1871 call for a thorough reevaluation of the use to which the Civil Rights Act is being put. And, we believe, the Act can be amended to restrict frivolous claims without restricting the vigorous protection and enforcement of civil rights.

NIMLO is a non-profit, non-partisan, fact-finding organization of some 1600 municipalities in all states. NIMLO was founded in 1935 by a group of city attorneys in order to fulfill the recognized need to collect and disseminate the varied legal experiences of American municipalities. Each member municipality participates through its chief legal officer, variously called city attorney, city solicitor or corporation counsel, and his staff of assistants. NIMLO serves as a clearinghouse of information pertaining to the operation of the municipality through research services and publications. NIMLO also participates on the judicial level through the filing of briefs amicus curiae in the Supreme Court of the United States in cases of nationwide consequence to municipalities. It was in that last capacity that we began to study the actual impact of §1983 litigation on local governments. NIMLO prepared a brief amicus curiae in the Supreme Court in the recently argued case involving an award of punitive damages under §1983 against a local government for denial of a permit or agreement to add a rock band to a jazz concert because of the potential danger.[2] In the course of collecting data for that brief, we found that local governments nationwide are experiencing what we know to be true in our own cities: that the lack of clear guidance from the Congress has encouraged the lower federal courts to apply the Civil Rights Act in situations and with results not contemplated by the 42d Congress in 1871, and probably not fully appreciated by the present Congress.

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[1] Monell v. Department of Social Service, 436 U.S. 658, 695 (1978); Maine v. Thiboutot, 48 U.S.L.W. 4859, 4861 (1980).

We have collected and updated these facts, analyzing recent Supreme Court decisions and considering an appropriate rebalancing by the Congress in a paper entitled "Amendments to the Civil Rights Act of 1871 and the Civil Rights Attorney's Fees Awards Act of 1976: A Report to the Congress by Municipal Attorneys Defending §1983 Cases". We incorporate that report by reference in this prepared statement, and ask the Committee to receive it into the hearing record. We also ask the Committee to receive two other analytic reports, both of which are also attached. The first, entitled

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[2] City of Newport v. Fact Concerts, Inc., No. 80-396 (Sup.Ct. U.S.), argued March 31, 1981.

"Frivolous Claims and Inequitable Fee Awards and Denials: Result of a Questionnaire by the National Institute of Municipal Law Officers on Civil Rights Litigation Under Recent Supreme Court Decisions" sets out partial answers to open-ended and narrative questions on current problems in defending §1983 cases. The responses to this questionnaire are still coming in, and we will be glad to summarize and provide them to the Committee as we receive them. The final attachment to this prepared statement is a legal analysis by one of us, Marvin J. Glink, and his associate, Katherine S. Janega, entitled "Setting the Depths of the Municipal Pocket: a Proposal for the Reevaluation of Municipal Liability under Sections 1983 and 1988 after Monell, Owen and Thiboutot."

Although these reports and analyses propose specific legislative remedies, we feel we can be of greatest service to the Committee by pointing out the facts and nature of litigation under §1983 at present. That step must precede drafting and markup. And, frankly, we feel that the failure to prepare the facts and experience of local governments under the Act has been a major failing of these governments, both in court and before the Congress. We hope we can remedy that failing in part by our submission today.

It is important for the Congress to recognize that recent Supreme Court decisions construing §1983, especially the Owen and Thiboutot decisions last Term, have galvanized and unified local governments in a call for congressional action based on full information and full protection of civil rights.

The National League of Cities at its meeting in Atlanta on December 3, 1980, adopted the following resolution:

"MUNICIPAL LIABILITY

> "WHEREAS, recent decisions of the federal courts have exposed municipal governments to liability for violations of constitutional rights and federal laws;
>
> "NOW, THEREFORE, BE IT RESOLVED that the National League of Cities will
>
> "1) Propose and support legislation extending the good faith immunity to municipal governments in Section 1983 suits; and
>
> 2) Propose and support legislation limiting the coverage of Section 1983 to violations of constitutional rights." 3/

Similarly, the National Association of Counties adopted the following resolution for 1980-1981:

> "Resolution on the Liability of Local Officials under the Recent Decisions of the United States Supreme Court
>
> "Whereas, Recent decisions of the United States Supreme Court have raised the possibility of increased financial liability of units of local governments for actions taken by government employees; and
>
> "Whereas, Litigation costs and final financial judgments as a result of these decisions could greatly increase the burden on all taxpayers; and
>
> "Whereas, NACo strongly opposes redressing personal wrongs by governmental actions [sic], and believes these wrongs could be redressed by injunctive, declaratory or other appropriate relief; therefore, be it
>
> "RESOLVED, That the National Association of Counties urges that:
>
> "A special task force of representatives from the public interest groups (NACo, National League of Cities, U. S. Conference of Mayors, National Governors Association, National Institute of Municipal Law Officers, the National District Attorneys Association and others) be organized to develop a coordinated approach to solve the common problems presented in the Monell, Lafayette and other decisions;
>
> "Congress enact legislation to define and limit the contours of personal and local government liability for damages and attorney fees in actions under the federal Constitution and laws relating to civil rights;
>
> "That the existing common law or statutory immunity of local government, and the officials thereof, should be preserved;
>
> "That the common law concepts of vicarious liability and injury to reputation shall not be changed." 4/

3/ Resolutions 1981, Adopted at the Annual Congress of Cities, Atlanta, Georgia, December 3, 1980, Resolution No. 2.

4/ American County Platform and Resolutions 1980-1981, National Association of Counties, at 148.

It is obvious that all local governments and their associations are agreed on the necessity of addressing what we call the Owen and Thiboutot problems. Although different drafters could address the problems in different fashions, all are agreed on the necessity of prompt and clear congressional guidance.

For this reason, we support amendments which are clear and unambiguous, in the manner of S.584 and S.585. We support these bills because it is we who must represent our governments and government officials under §1983 in its present confused and inequitable state.

We believe that we understand the realities of litigation today under §1983. And we offer to the Committee not only our own experience but that of over 200 other local governments reported to NIMLO. We assure you that the problems we describe are occurring now, nationwide. And they will worsen, and the financial plight of our cities will worsen, unless a balance is restored to civil rights litigation.

We are not against vigorous enforcement of legitimate civil rights. Some city attorneys are elected; all work for elected local officials. None either wants or is able to avoid municipal liability for clear violation of constitutional rights by official government policy. That is not why we are here. We are here to oppose application of §1983 to cases having nothing to do with civil rights, and the denial to local governments of the same defenses available, through a careful balancing of interests, to their government officials. Because this kind of balancing is most properly the task of the Congress, we are before you today.

We hasten to add, however, that a true balancing of the financial needs of local governments and the constitutional rights of their citizens must be struck. It is not enough merely to say that the purpose of a bill is a balancing, when the bill offers no protection to the legitimate needs of local governments and the citizens who pay the taxes and money judgments assessed against these governments. We have concluded that such bills as S.35 in the 95th Congress, S.1983 in the last Congress, and S.990 now pending, are not really balancing bills. More to the point, they would cause grave problems for local governments without effectively discouraging violations of rights. Therefore, we hope to show this committee why bills following the pattern of S.584 and S.585 better balance all the relevant considerations which the Constitution requires the Congress to balance.

For, the interest of local governments is also of constitutional dimension. The Tenth Amendment, recently resuscitated after 40 years of desuetude, in National League of Cities v. Usery,[5] limits the ability of the Congress to impose overly burdensome costs on local governments. The Congress has imposed the same limitation, a requirement to avoid unnecessary and poorly planned costs on smaller local governments, on the Executive establishment in the Regulatory Flexibility Act.[6]

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[5] 426 U.S. 833 (1976).

[6] Pub.L.No. 96-354, 94 Stat. 1165 (1980), adding 5 U.S.C. §601 et seq.

The federal courts adhere to principles of self-restraint in avoiding interference with local law enforcement efforts, guided by the views of Mr. Justice Black in preserving "Our Federalism."[7]

Congress is beginning to wake up to the need to study the impact on litigation of the legislation it enacts,[8] and we applaud the effort. All these considerations counsel this Committee's careful consideration of the impact on local governments of any legislation it might recommend.

A good place to begin is with the impact on local governments and their citizen taxpayers of §1983 litigation in cases having nothing to do with civil rights, often prompted by the easy availability of attorneys' fees. We ask the Committee to acknowledge both the inequity and expense of depriving local governments, as the Supreme Court has done in the last year,[9] of the defenses to liability under §1983 which are available to these governments' officials.

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[7] Younger v. Harris, 401 U.S. 37,44 (1971) (abstention from deciding merits of claim); see also Rizzo v. Goode, 423 U.S. 362 (1976) (remedy dictating city complaint procedures interferes too greatly with city operations).

[8] Judicial Impact Statements: Hearings before the Subcomm. on Jurisprudence and Governmental Relations of the Senate Comm. on the Judiciary, 96th Cong., 1st (Ser.No. 96-48, 1979) and 2d (Ser.No. 96-73, 1980) Sess.

[9] Owen v. City of Independence,445 U.S. 622 (1980).

Not only is this expanded and defenseless municipal liability unfair. It makes impossible our main duty to our government clients: the giving of sound risk management legal advice, in order to minimize civil rights violations in the first place.

NIMLO fully supports the spirit of S.584 and S.585. We wish to make it absolutely clear that we fully support the vindication of individual civil rights and we recognize the capacity of pioneering litigation to expand these rights to their full and proper flowering. But, recent judicial interpretations of the congressional intent behind the enactment of the Civil Rights Act of 1871 have resulted in excessive, and, we submit, unintended, federal judicial interference in state and local operations. Beyond the obvious liability for monetary damages, remedy decrees in civil rights actions often order governments to establish or maintain programs and services, usually under the supervision of the court, at a cost which is often unpredictable. Punitive damages are also available under the Civil Rights Act,[10/] even where the plaintiff has suffered no actual injury, as in the case of a developer who passed the added cost of being denied water hookup by a local government on to the purchasers of his house.[11/] The attractiveness of §1983 as a vehicle for the assertion of frivolous

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[10/] Fact Concerts v. City of Newport, 626 F.2d 1060 (1st Cir. 1980), cert. granted, No. 80-396.

[11/] Heritage Homes, Inc. v. Seekonk Water District, 498 F.Supp. 463 (D. Mass. 1980), $100,000 puntive damages.

claims due to the availability of attorneys' fees [12] has produced figures of pending claims against municipalities in civil rights actions of staggering amounts.

This current state of civil rights enforcement makes it imperative for this Congress to amend §1983. We suggest that with slight modifications to S.585, as suggested in the "Report to the Congress by Municipal Attorneys Defending §1983 Cases," submitted to the Committee, and the introduction of a bill to amend the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988, to limit the award of attorneys' fees to prevailing plaintiffs in §1983 suits against municipalities and allow the recovery of attorneys' fees by prevailing municipal defendants, S.584 and S.585 would go far in restoring the proper, and intended, balance between the protection of civil rights and the excessive federal interference in state and local operations which existed prior to the decisions in *Owen* v. *City of Independence* and *Maine* v. *Thiboutot*.

We believe we can be of greatest assistance to the Committee by showing the current problems in §1983 litigation. We think the Committee's amendment of §1983 should respond to reality, not to merely political statements.

I. THE CURRENT STATE OF CIVIL RIGHTS ENFORCEMENT AGAINST LOCAL GOVERNMENT: THE NEED FOR AMENDMENT

Judicial interpretations of the Civil Rights Act of 1871, 42 U.S.C. §1983, over the past five years have produced a flood of litigation in which local governments and their officers and employees are forced to defend their actions against claims that some "official" action or policy infringed upon a complainant's civil rights. Where the governmental entity was once immune from suits under §1983,[13] it is now a proper defendant along with its officers and employees.[14] Where once, although a proper defendant in a 1983 suit, the governmental entity could assert the same immunities of its officers,[15] it now is unable to do so.[16] Where once liability attached only for constitutional violations, liability now attaches for violations of federal statutes such as grant eligibility and distribution formulae.[17]

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[12] Attorneys' fees are authorized in cases under §§1981, 1982, 1983 and 1985(3) by the Civil Rights Attorney's Fees Awards Act of 1976, amending 42 U.S.C. §1988. Title VII and other more specialized civil rights acts have their own fees provisions.

A. THE MAGNITUDE OF CIVIL RIGHTS CLAIMS AFTER OWEN AND THIBOUTOT

1. Damages Claimed

A survey of NIMLO members, conducted for the purpose of these hearings, and provided to the Committee, illustrates the magnitude of the situation created by the recent interpretations of §1983. The survey and reports received since its printing reveal an amount in excess of $4,858,794,999.00 claimed in civil rights actions currently pending against 215 municipalities. Claims for punitive damages alone against 46 municipalities total $1,057,295,700.00.[18/] In addition, numerous suits state not dollar amount of damages claimed but merely request "such other relief as the Court deems just."[19/]

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[13] Monroe v. Pape, 365 U.S. 167 (1961).

[14] Monell v. Department of Social Services, 436 U.S. 658 (1978).

[15] Monell v. Department of Social Services, 436 U.S. 658 (1978).

[16] Owen v. City of Independence, 445 U.S. 622 (1980).

[17] Maine v. Thiboutot, 48 U.S.L.W. 4861 (1980).

18/ We do not assert that the amount of claims asserted represents the amount of actual damages recovered.

Assuming that only 1% of the amounts of claims ripen into judgments — a very conservative assumption, as the preliminary results reported in the attached "Frivolous Claims and Inequitable Fee Awards" show — extension of the $4 billion claims figure (for 200 governments) to the 39,000 local governments in our nation (a figure generally used to describe general purpose local governments; the Advisory Commission on Intergovernmental Relations describes a total of 80,000 units of government, The Federal Role in the Federal System: A Crisis of Confidence and Competence, Report No. A-77, at 2 (1980)) would produce a figure of $780 billion in §1983 claims pending, and (at 1%) an estimate that these claims will ripen into judgments totalling $7.8 billion in local tax-raised revenues.

This is a major redistriction of money from local taxpayers to local plaintiffs. And, Congress should carefully reexamine the rules under which the redistribution is being conducted by the courts.

Moreover, the mere necessity to defend a suit, once filed, regardless of the amount involved has an effect on the governmental entity. The defense of the 1983 suit diminishes the time available to carry out official duties. The effect of the pendency of a suit and its uncertain result has a chilling effect on the official decisionmaking process.

19/ In a suit against the City of Ocala, Florida, plaintiffs have requested that $2.8 million in federal revenue sharing funds received by the city be placed in escrow. Letter of 3-31-81 to Charles S. Rhyne from Seymour H. Rowland, Jr., City Attorney, Ocala, Florida.

Of course, the reported figures do not represent the cost of the municipal defense, or the cost of court-ordered attorneys' fees to prevailing plaintiffs.[20]

2. Equitable Remedies

Nor do the figures begin to describe the cost of the implementation of various equitable remedies imposed by the courts in this modern era of civil rights enforcement. In the last twenty years, equitable decrees have become positive commands to expand government activity, and to pay for the expansion. In some cases, the command relates directly to the liability found against government defendants. Employment discrimination cases, often brought under both §1983 and Title VII of the Civil Rights Act of 1964, result in awards of backpay for the period a promotion was denied.[21] Backpay is considered an equitable, rather than a legal, remedy. Hiring quotas might be imposed.[22]

In other cases, the remedy is much broader. Parma, Ohio has been ordered, on a finding of violation of the Fair Housing Act by operation of the zoning code and the decisions and comments of councilmembers, not merely to forswear discrimination for the future, but to approve public housing and to apply for federal grants to finance it.[23] In Cleveland, a federal court has appointed an administrator of desegregation and litigation continues on the extent to which his powers override those of the elected school board.[24]

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[20] These fees are not limited by the amounts claimed, or recovered, on the merits of the civil rights claims. E.g., *Copeland* v. *Marshall*, 641 F.2d 880, 893 (CADC 1980)(en banc) $33,000 recovery, $160,000 attorneys' fees; *Coop* v. *City of South Bend*, 635 F.2d 652 (CA7 1980), $510 recovery, $6,000 attorneys' fees.

[21] E.g., $205,000 to 15 women disqualified by police department entrance height and weight requirements, reported in *Fair Employment Report*, Feb. 16, 1981, at 26.

[22] E.g., *Bridgeport Guardians, Inc.* v. *Civil Service Comm'n*, 482 F.2d 1333 (2d Cir. 1980).

It has come to the point in school desegregation cases where liability, the fact of intentional segregation, is contested only to limit the geographical scope of the busing remedy.[25]

Rizzo v. Goode,[26] a case in which the Supreme Court refused to approve a court-ordered procedure to handle complaints of police misconduct, stands as an exceptional exercise in judicial restraint. The more common case is the one on the Parma model, with detailed and expensive judicial supervision of government operations for years after the judgment of liability.[27] For example, the court in New

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[23] United States v. City of Parma, C.A. No. C73-439 (N.D. Ohio Order Dec. 4, 1980).

[24] Reed v. Rhodes, 635 F.2d 556 (CA6 1980), modified 642 F.2d 186 (CA6 1981).

[25] E.g., Columbus Board of Education v. Penick, 443 U.S. 449 (1979); Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977).

[26] 423 U.S. 362 (1976).

[27] As in Parma and Cleveland, the supervising court often appoints a special master sympathetic to the original plaintiffs, either to make recommendations to the court, or to operate government programs directly. See Note, Implementation Problems in International Reform Litigation, 91 Harv.L.Rev. 428 (1977). The school board of the City of Jackson, Tennessee has been under the supervision of the federal district court since a desegregation suit was brought against the board in 1963. The court must approve all matters as inconsequential as the transfer of one student. A motion to dismiss has been pending for four years. Letter of April 7, 1981 to Mr. William S. Rhyne from Russell Rice, City Attorney, Jackson, Tennessee.

York State Ass'n for Retarded Children, Inc. v. Rockefeller,[28] remedied mistreatment attributable to a staff shortage by ordering an increase in the number of staff physical therapists and a 10% increase in pay to attract better therapists.[29]

The lesson of these costly and largely unpredictable equitable remedies is that they constitute a major part of the problem of frivolous §1983 litigation against local governments. Any restoration of a defense of good-faith or other immunity to local governments should recognize the importance of the cost of equitable relief, and the pervasiveness of claims for such relief in both meritorious and meritless §1983 actions. To draw a distinction between actions for damages or monetary relief and actions for equitable relief including injunctions and declaratory judgments reflects a lack of understanding of the nature of §1983 litigation. In drawing such a distinction, bill S.990 would introduce a serious confusion in §1983 litigation and, in this regard, would make the situation worse not better. For this reason, we favor the clarity of S.585 on this point.

II. THE OWEN PROBLEM AND THE NEED FOR DERIVATIVE GOVERNMENTAL IMMUNITY

In Monell v. Department of Social Services,[30] the Court held that local governments were "persons" subject to suits for violation of §1983. Thus, after Monell, but before Owen v. City of Independence,[31] a government was subject to suit under §1983 along with its officers.

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[28] 357 F.Supp. 752 (E.D.N.Y. 1973).

[29] In Halderman v. Pennhurst State School, 612 F.2d 84, 114-15 (3d Cir. 1979), reversed 451 U.S. __ (April 20, 1981), retarded children were ordered removed from an institution and placed in "community living arrangements" at public expense.

[30] 436 U.S. 658 (1978).

[31] 445 U.S. 622 (1980).

But the government, which can act only through its officers, could take derivatively the same immunities the officers took. Legislators,[32] judges,[33] and prosecutors[34] are absolutely immune in cases seeking only monetary relief. Executive officials take only a qualified immunity in monetary cases, requiring the officials to show their good faith belief that their actions were lawful. The existence of a good faith belief in the legality of one's actions can only be established at trial or a substitute such as a motion for summary judgment. This qualified immunity, then, reduces the cost of §1983 liability, but not the cost of §1983 defense.

It seems to us both logical and fair that governments, which act only through employees, should partake of the same absolute or qualified immunity as their employees. But after the decision in Owen local governments are entitled to neither the absolute nor qualified, good faith immunity in §1983 cases.

To the Court in Owen, "the knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights."[35] Failure to recognize that such knowledge will also deter conduct which would not violate constitutional rights; the effect of Owen's strict liability is to paralyze government.

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[32] Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980); local; Tenney v. Brandhove, 371 U.S. 367 (1951), state; Doe v. McMillan, 412 U.S. 306 (1973), federal.

[33] Pierson v. Ray, 386 U.S. 547 (1967).

[34] Imbler v. Pachtman, 424 U.S. 409 (1976).

[35] 445 U.S. at 651-52.

To assume that a judgment for a 1983 violation against the governmental body, where the offending actor has established his good faith belief that his conduct was lawful, will not inhibit the officer's vigorous exercise of his discretion is erroneous. It is not inconceivable that an officer's good faith belief, which costs the city considerable expense, will not insulate him from further disciplinary action by the governing body under civil service rules or personnel regulations.[36/] At least one commentator has recognized the likelihood that as large judgments against municipalities become more common, "public officials will surely feel pressures of the kind that in other cases would support the recognition of a good faith defense for individual defendants."[37/] The time required to defend a 1983 suit deters from the performance of official duties and the uncertain result will also influence the exercise of official discretion.

A. S.585 AND THE NEED FOR MODIFICATION

S.585 addresses the Owen problem and provides that no action can be maintained against a city which acted in good faith. This certainly is the correct result, at least with respect to good faith immunity. It would be difficult, however, precisely because the government can act only through its officers, to prove the good faith

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[36/] Typically such statutes or regulations provide for removal for cause, defined as "'some substantial shortcoming which renders the employee's continuance in office in some way detrimental to the discipline and efficiency of the service and which the service and sound public opinion recognize as good cause for his no longer holding the position.'" 4 McQuillin, Municipal Corporations §12.230.

[37/] A. Howard, I'll See You in Court: the States and the Supreme

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of the government defendant independently of the good faith of its officers. Plaintiffs would claim that, although a particular decisionmaker acted in good faith, a climate of, say, racial bigotry pervaded the department charged with implementing the decision. So, the plaintiffs would argue, the decisionmaker showed his good faith, but the government did not. Governments should not have to rebut this kind of argument. Therefore, it is appropriate for the good faith of the decisionmaking officers to be proved, and the government simply to take the same immunity derivatively.

For the same reasons, we feel that the government similarly should take a derivative absolute immunity where its officials are absolutely immune. For example, the rezoning of property is a legislative act and a city council taking a rezoning action, accordingly, is absolutely immune in a §1983 case. That is as it should be because the good faith of the council, which the councilmembers would have to prove if their immunity were only a qualified one, can be proved only by complex economic and demographic data on land use patterns and potential land uses and values. It is common knowledge that zoning challenges are very expensive for both landowners and governments, and subject to inconsistent judicial conclusions drawn from

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Court (1980), Nat'l Governors' Ass'n, Center for Policy Rsch., 28.

The example from Wilmington, Delaware, of a police department afraid to discipline its own officers for fear of §1983 suits surely bears this out. (The example is reported in the attached "Frivolous Claims and Inequitable Fee Awards"). In this case, the paralysis of §1983 actually retards the enforcement of civil rights by inhibiting vigorous police department internal control.

complicated expert testimony and data submitted by both sides. The liability of the city councilmembers should not be made to depend on the ability of the councilmembers when they are legislating a rezoning to predict a court's conclusion whether the application of the rezoning to a particular parcel diminished too greatly the value of the parcel. The absolute immunity of local legislators guards against such an unsure and unfair result.

The same is true for the local government itself. Therefore, we feel that the immunity of the local government should parallel that of the government officials whose actions brought the government into the 1983 suit inthe first place. Where the officials are absolutely immune from a monetary award, the government should be too.

Nothing in such a legislative change - or in any attempt to change the result in Owen - would diminish the availability of an injunction against local government officials to prevent unconstitutional action. Indeed, injunctions against government officials were freely available, and very effective, even when local governments were absolutely immune under the decision in Monroe v. Pape, 365 U.S. 167 (1961).[38/] In the rezoning case, even after the change we advocate, a court would remain free to enjoin enforcement of the rezoning and to compel the city council and staff to study the matter further and to adopt some different rezoning.

S.585 makes no provision for this and we would urge consideration of the recommended changes to bring about this result, so that the

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[38/] Rowley v. McMillan, 502 F.2d 1326, 1331 (CA4 1974), "the doctrine of immunity...has no application to a suit for declaratory or injunctive relief...."

same defenses and immunities available to government officials are available to governments themselves.

III. THE THIBOUTOT PROBLEM AND THE NEED FOR A LIMITATION TO CIVIL RIGHTS VIOLATIONS

Shortly after the blow dealt to local governments by the Owen decision, the scope of "rights" encompassed by §1983 was broadened to include rights conferred by federal statute by the decision in Maine v. Thiboutot.[39/] After Thiboutot, §1983 claims are not limited to those involving civil rights violations. Thiboutot involved the calculation of welfare benefits. In combination with the result in Owen, this means that local governments are defenseless against claims for monetary relief based on the administration of many grant programs and other programs provided by federal statutes. Mr. Justice Powell listed over a dozen in his dissenting opinion in Thiboutot. The Advisory Commission on Intergovernmental Relations has identified 492 federal mandates on local government. Under the law of the Thiboutot case, each of these mandates states a §1983 claim in a citizen suit. Where the error of the local government is clear, the monetary payment is not unjust. However, it does not take much imagination to think of cases where the error would by no means have been clear to, and therefore unavoidable by, the government officials making the decisions later challenged in the 1983 action.

[39/] 48 U.S.L.W. 4859 (1980). The plaintiffs in Thiboutot challenged the state's determination under 42 U.S.C. §602(a)(7) that support paid for the father's children by a previous marriage would not be considered in computing AFDC benefits to which he was entitled for the three children exclusively his.

More pernicious is the effect of Thiboutot in allowing private litigants to challenge under a federal statute entirely unrelated to civil rights, some local government action which has been approved by the superintendents of the federal statutory scheme in the federal agencies. For example, a plaintiff might claim that his federal right to cleaner air, grounded in the Clear Air Act[40/] was impaired by a state's or city's failure to enforce pollution restrictions more vigorously as by inspecting the emission control devices on all automobiles. In a §1983 action, the plaintiff would not be bound by any doubt the federal EPA might have whether such an enforcement policy was lawful or cost-beneficial.[41/]

The State and Local Fiscal Assistance Act of 1972[42/] provides another example. Prior to the submission by the recipient of revenue sharing funds, of the budget to the governing body for enactment, at least one public hearing must be held "at which citizens shall have the opportunity to provide written and oral comment on the possible uses of such funds before the governmental authority responsible

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[40/] 42 U.S.C. §7401 et seq.

[41/] The decision in City of Milwaukee v. Illinois, 451 U.S. __ (Apr. 28, 1981) would not foreclose this result. Milwaukee involved the Clean Water Act, and a detailed permit issued by state authorities conforming to federal standards. This is a regime much more specific and much more directly federalized than that under the Clean Air Act.

[42/] 31 U.S.C. §1221 et seq.

for presenting the proposed budget...."[43] In the absence of express requirements, the governing body must decide where the hearing will be held, how it will be conducted and its duration. This is a wise recognition by both the Congress and the federal Office of Revenue Sharing of the need for local adaptability. It is not difficult to imagine a participant at that hearing, disgruntled with the subsequent use made of the funds, suing under §1983 and alleging that the time allotted to speak or the procedure established for the conduct of the hearing, or its location, somehow infringed his right under the statute to be heard. His suit would not be barred by the fact that the procedure he challenged was perfectly satisfactory to ORS.

This analysis would apply equally to the numerous conditions attached to all grant statutes, 13 of which were identified by Justice Powell in his dissent in Thiboutot.[44]

Many of the actions by local government officials in federal programs are taken pursuant to federal requirements. Yet, federal officials cannot be sued in §1983 actions. Therefore, local governments will be absolutely liable after Thiboutot, even where the federal officers and agencies issuing the directives which local officials merely followed, cannot be joined in the same action and cannot be made to share responsibility, and where the local officials themselves would have the benefit of the good faith immunity denied to the government under Owen.

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[43] 31 U.S.C. §1241(b). The implementing regulations, 31 C.F.R. §51.13, set forth no guidelines regarding the location, length or conduct of the hearing.

[44] 48 U.S.L.W. 4859 at 4868-69.

Thus, the effect of Thiboutot will be to sap the responsible enforcement of federal non-civil rights laws by the federal officials charged with their enforcement. We do not tolerate such second-guessing in the area of criminal prosecutions, and the Congress should not tolerate it in the non-civil rights area either.[45]

A. S.584 AND THE SOLUTION

S.584 solves the Thiboutot problem perfectly by limiting the federal "laws" incorporated by §1983 to laws providing for equal rights. We fully support this change.

IV. THE PROBLEM OF COURT-AWARDED ATTORNEYS' FEES

The unwarranted burden on local governments produced by damage awards and the costly implementation of equitable remedies become even more evident when one looks at the results of the judicial implementation of the Civil Rights Attorney's Fees Awards Act of 1976, amending 42 U.S.C. §1988.

The Act authorizes an award of attorneys' fees to a prevailing party in suits under §1983. In theory, the fee is withheld unless the plaintiff shows that his case advanced his own interests, at least, or the interest of society at large. The implementation of the Act, we submit, has resulted in payment by local governments well beyond that necessary to accomplish the purposes of the Act - the bringing of meritorious civil rights cases by authorizing the courts to award prevailing plaintiffs attorneys' fees approximately market rates.

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[45] It is worth noting that nothing in an amendment to solve the Thiboutot problem, such as S.584, would restrict the availability of citizen suits in the face of federal non-enforcement of civil rights where Congress has specificially provided, as in §5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c.

Armed with the legislative history of the Act,[46] the courts have awarded fees where a suit results in a consent decree with no admission of fault,[47] in a settlement with no admission of discrimination,[48] and where preliminary or temporary relief, or defendants' unilateral or legislative actions moot the case.[49]

Although a causal connection between the suit and the governmental change has been required,[50] the required proof is negligible.[51]

In calculating the amount of fees recoverable, the judicially imposed guidelines are broad indeed. Thus, a prevailing plaintiff in a sex discrimination claim was entitled to recover for all of the time reasonably spent on the matter even if she prevailed only in part on the claim.[52/] Bonuses or multipliers of 1 1/2 to 3 representing such factors as the unpopularity of the case are routinely awarded.[53/]

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[46] S. Rep. No. 94-1101, 94th Cong., 2d Sess.; H.R.Rep. No. 94-1558, 94th Cong., 2d Sess. (1976).

[47] *Massachusetts Fair Share* v. *O'Keefe*, 476 F.Supp. 294 (D. Mass. 1979), temporary restraining order granted charitable organization allowing it to hold fundraiser. A consent decree was negotiated following discovery in which the defendant agreed to give the plaintiff the same consideration in granting of permits.

[48] *Foster* v. *Gloucester County Board of Chosen Freeholders*, 465 F.Supp. 293 (D. N.J. 1978).

[49] *Williams* v. *Alioto*, 625 F.2d 845 (9th Cir. 1980), cert. denied, No. 80-653, only event in case a preliminary injunction. Further proceedings were moot because the police investigation using challenged search practices was concluded while appeal of injunction was pending; *Darensbourg* v. *Dufrene*, 460 F.Supp. 662 (E.D.La. 1978), suit under §1981 alleging racial discrimination on part of day care operator for refusal to admit two black children. Prior to issuance of injunction, children were admitted; *Criterion Club of Albany* v. *Board of Comm'rs of Dougherty County*, 594 F.2d 118 (CA5 1979), prior to trial in voting rights suit, parties reached agreement providing for introduction of bill to redistrict county which was enacted into law.

[50] *Cicero* v. *Olgiati*, 473 F.Supp. 653 (S.D. N.Y. 1979), subsequent legislative action.

[51] "[Contrary to the result reached in *Cicero* v. *Olgiati*, 473 F.Supp. 653 (S.D. N.Y. 1979)] many courts have been willing to assume a

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Cases undertaken solely to obtain damages, but not to effect a change in government operations, will produce court-awarded fees bearing no relation to the damages recovered. In Furtado v. Bishop,[54/] the court rejected a cap on fees of 1/2 of the judgment awarded, even while recognizing that the standard, private litigation, 1/3 contingency fee arrangement applied precisely this cap. As a result, the court awarded a $21,000 fee for obtaining $27,000 in damages.[55/]

This discrepancy between the promise of the Fees Act and its implementation by the courts will remain even if §1983 is amended to solve the Owen and Thiboutot problems. Even after the Owen problem is solved by restoring some immunity from damages to local governments

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causal relationship from chronology & other evidence. (citing cases)." Questions Surrounding "Prevailing Party" Language in Civil Rights Attorney's Fees Awards Act, Committee Report No. 37, Lawyers' Committee for Civil Rights Under Law, 4 (April 1980).

[52/] Sherkow v. State of Wisconsin Department of Public Instruction, 630 F.2d 498 (CA7 1980).

[53/] Neely v. City of Grenada, 624 F.547 (CA5 1980).

[54/] 635 F.2d 915 (CA1 1980).

[55/] See also Coop v. City of South Bend, 635 F.2d 652 (CA7 1980), $600 fees for obtaining $510 damages; Copeland v. Marshall, 641 F.2d 880 (CADC 1980)(en banc), award of $160,000 fee for obtaining $33,000 backpay.

sued under §1983, fees may still be awarded against governments which are immune from damages. The leading case is Entertainment Concepts v. Maciejewski.[56] There the Court of Appeals reversed denial of an award of attorneys' fees against local officials who were immune from liability because they had acted in good faith. So, by itself, an amendment to §1983 will not make governments, immunized from damages, immune from attorneys' fees.

On the other side of the coin, when the local government is the prevailing party, fees are infrequently awarded.[57] A substantial burden is placed on the prevailing government defendant to show that the plaintiff's claim was not frivolous, unreasonable or groundless, or that the plaintiff continued to litigate after the claim clearly became so.[58]

Finally, the active involvement of plaintiffs' civil rights organizations in the financing and conduct of §1983 suits calls into question the continuing validity of Congress' finding in enacting the Fees Act that the possibility of an award of attorneys' fees was necessary to encourage the bringing of meritorious suits. The advent of national plaintiffs' civil rights organizations such as the NAACP,[59] ACLU and The Lawyers' Committee for Civil Rights Under Law which hire private local counsel, as well as providing their own staff assistance, is a sign that the strength of these organizations has grown to the point where the theory behind the court-awarded fees no longer applies, at least in cases conducted or financed by such organizations.

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[56] 631 F.2d 497 (CA7 1980), cert. denied No. 80-1039 (Feb. 23, 1981).

[57] Bennett v. Cramer, 495 F.Supp. 191 (E.D. Wis. 1980).

[58] Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978). The applicability of the Court's rejection of the argument that a prevailing defendant must show that the plaintiff's suit was brought in bad faith to recover attorneys' fees, in interpreting the statutory language involved in that case, was called into question in Kane v. City of New York, 468 F.Supp. 586 (S.D. N.Y. 1979). The Court in that case noted the language in the legislative history of §1988 ("this bill deters frivolous suits by authorizing an award of attorneys fees against a party shown to have litigated in 'bad faith'...." S.Rep. No. 94-1011 97th Cong., 2d Sess. 5 (1976)) but did not address the discrepancy because of a finding by the trial court of bad faith.

The courts have notably disregarded, in considering the fee issue, the availability of publicly financed organizations to fund civil rights litigation. A prevailing plaintiff's representation by a public service law firm or association funded by public funds has been held irrelevant and thus not justifying a reduction of about one-half in an award of attorneys fees.[60] An award was also authorized in an action brought under §1983 for delays in processing welfare applications even though the attorneys worked for a nonprofit legal aid organization.[61]

Such a situation is even more troublesome because these organizations typically direct a test case against small local governments with limited financial and legal ability to sustain defensive litigation.[62]

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[59] An action challenging the hiring, assignment, promotion and discipline practices of the City of Louisville, Kentucky police department was brought with the backing of the full resources of the NAACP Legal Defense and Education Fund, Inc. in 1974. Remarks of Henry Watson III, presented at NIMLO Seminar on Civil Rights Litigation, April 12-14, 1981.

[60] Watkins v. Mobile Housing Board, 632 F.2d 565 (CA5 1980).

[61] Custom v. Quern, 482 F.Supp. 1000 (N.D. Ill. 1980).

A. THE PROPOSED SOLUTION AND ALTERNATIVE SUGGESTIONS

S.584 and S.585 do not address the danger of encouraging frivolous litigation created by the availability of an award of attorneys' fees in §1983 suits. The "Municipal Attorney Draft Bill to Amend §§1983 and 1888," which is before the Committee,[63] removes this incentive to questionable litigation by limiting the discretionary award of fees to awards against the United States in enforcement actions under Title VI of the Civil Rights Act of 1964. This amendment would have the effect of freeing local governments from frivolous suits by private plaintiffs under §1983 but, at the same time, providing these governments reimbursement for their fees in defending frivolous actions brought against them by the U.S. to enforce grant conditions.

However, other restrictions short of making attorneys' fees unavailable in §1983 actions against local governments would go far to alleviate our concerns.

We suggest the following possibilities:

1. Require that the plaintiff show a causal connection between his action in bringing suit and any subsequent change in official

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[62] For example, the Lawyers' Committee for Civil Rights Under Law, assisted by grants from private foundations, has created a North Carolina Municipal Services Project to litigate cases against cities in that state. The first three targets were cities of 26,000, 33,000 and 14,000 in population. Lawyers' Committee, Monthly Report, December 1980.

[63] Appendix C to the attached "Report to the Congress by Municipal Attorneys."

governmental policy or conduct. This would require more than a showing of coincidence. For example, in a situation such as in Owen, where the Supreme Court decisions declaring a right to a hearing prior to termination were issued after Chief Owen had been fired,[64/] the plaintiff would have to show that any decision by the governmental entity to provide a pre-termination hearing was the direct result of the plaintiff's suit rather than of the intervening Supreme Court decisions.

2. The plaintiff should be limited to a recovery of fees for time spent only on those issues on which the plaintiff prevailed.

3. Fee awards should be subject to a "cap" of 1/2 of the damages recovered. Where the suit results in an injunction or declaratory judgment, fees should not be allowed absent a showing that the suit produced the desired change in governmental action, subject to a limit on the maximum amount recoverable.

4. Determination of the fee award should not allow the use of a multiplier. Computation of the award should be based on the hourly rate times the number of hours spent on the issues on which the plaintiff prevailed.

5. Fees should not be allowed for the litigation of a fee award. Allowing fees in this situation encourages delay and obstinacy.

6. Amendment of §1988 should also provide for equal treatment for prevailing government defendants. This would necessarily require the legislative overruling of Christiansburg Garment. Such a change could be accomplished by inserting language authorizing the court, in its direction, to award attorneys' fees to a prevailing party provided

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[64/] 445 U.S., at 631.

that the same standards applied to prevailing plaintiffs would be applied equally to prevailing defendants.

7. Finally, we suggest that no fees be awarded to an organization or association whose financial support is derived from sources other than legal fees unless the organization or association can show that it would not have brought the case but for the availability of the fee award.

To a great extent, amendment of the Fees Act is independent of the amendment of §1983. Many of the abuses of the Fees Act occur in cases in which clear violations of civil rights have been shown; in this sense, the fees problem is broader than the §1983 absolute liability problem. At the same time, the too easy availability of attorneys' fees encourages frivolous §1983 claims, prompting the need for legislation along the lines of S.584 and S.585.

V. S.990 AND THE LEGAL/EQUITABLE DISTINCTION

While our purpose is to bring to the attention of the Committee the facts of the need for amendment of §1983 (and §1988) which might not otherwise be available to the Committee, rather than to promote one form of amendment to the exclusion of some other form, we do want to support our statement that the scheme of amendment embodied in S.990 would not address adequately the concerns which those litigating §1983 cases for their government and official clients have. Therefore, we address the distinction made in S.990 between the actions brought under §1983 for damages or other monetary relief"[65/] and actions seeking equitable relief so that it is clear to the Committee the effect that such a distinction could have.

[65/] S.990, §2, adding 42 U.S.C. §1983(c)(1).

In an action for damages, S.990 would require a plaintiff to show that the offending conduct or policy met one of four requirements.[66/] This requirement purports to limit the circumstances where governmental entities would be liable under §1983 by "restricting liability to situations where there is a reasonable expectation that the fear of monetary damages would lead the entity to adopt preventive measures aimed at deterring future §1983 violations."[67/] In light of the very broad nature of the requirements, we submit that S.990 is no limitation at all, even as to damages actions. As we have seen, the quality and quantity of proof necessary to establish governmental policy or custom, especially where alleged to conflict with formal legal provisions, is uncertain in §1983 cases. Thus, a policy of not training employees who then misbehave in ways training might have avoided states a claim.[68/] Even underfunding can constitute an actionable policy.[69/]

More perniciously, S.990 would make local governments absolutely liable in any case other than one for "damages or other monetary relief," that is, in any equitable action.

[66/] (1) That the offending conduct was authorized by statute, ordinance, policy or practice.
(2) That a supervisor encouraged or directed a subordinate to engage in the offending conduct;
(3) That an employee has a history of misconduct and his supervisor has failed to take action to prevent its recurrence; or
(4) That a §1983 action is documented but the plaintiff is unable to identify the offending actor.

[67/] 127 Cong. Rec. S3868 (daily ed. Apr. 10, 1981)(remarks of Sen. Mathias).

[68/] Knight v. Carlson, 478 F.Supp. 55 (E.D. Cal. 1979).

[69/] Mays v. Eldrod, 470 F.Supp. 1188 (N.D. Ill. 1979), jail.

This distinction runs counter to the reform in the adoption of the Federal Rules of Civil Procedure in 1938, abolishing the distinction between law and equity. Fed. R. Civ. P. 1, 2. And, such a distinction would introduce unnecessary confusion into the administration of §1983 by the courts, to the probable detriment of local governments, their taxpayers and their citizens.

On a more fundamental level, there is no reason based on experience and the nature of §1983 litigation — as we have shown above — for assigning a presumption of merit to cases simply because they seek an equitable remedy (which, we have shown, is often more costly, and always more disruptive, than damages). Put another way, if some immunity, defense or requirement of a prima facie case is desirable in damages actions, the same amendment is desirable in equitable actions. And, as we have indicated earlier, derivative immunity for the governmental entity would not diminish the availability of an injunction against government officials or declaratory relief to prevent future unconstitutional conduct.

Perhaps the clearest illustration of the disutility of a legal-equitable distinction is the Owen case itself. There, the police chief claimed he was fired without a proper hearing and opportunity to clear his name. He had no proposal for reform of the government, but he did claim backpay for the 8 years between the time he was fired and the time his case was decided by the Supreme Court. Backpay is an equitable remedy. Under one form of a legal-equitable dichotomy, limiting a good-faith defense to "an action of law," Chief Owen would still collect the 8 years' pay, even though he did no work for the City during that period. The result thus would be precisely the same as actually occurred in Owen: the City would be defenseless and absolutely liable. Moreover, it is doubtful that better drafting, such as S.990's addition of "monetary relief" to "damages" would improve the result. A federal court predisposed to an expansive reading of an amended §1983 (in opposition to the will of Congress, an unpleasant but hardly implausible or unprecedented prospect), would have no trouble reading "monetary relief" to mean only damages.[70/] At the very least, the dichotomy substantially prevents realization of S.990's articulated goal of "stability and clarity" (127 Cong. Rec. S3870, daily ed. Apr. 10, 1981, remarks of Sen. Mathias) in §1983 litigation.

The same dichotomy between immunities in law cases and those in equity cases, as contained in S.35 (95th Cong.), was opposed by the federal Justice Department's Civil Rights Division. Civil Rights Improvement Act: Hearings on S. 35 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess., 59 (1978).

The result of the legal-equitable dichotomy would be just as pernicious with respect to the Thiboutot problem as with respect to the Owen.

Under S.990, the same claim brought in Thiboutot (that welfare eligibility was miscalculated and an entire class was entitled to relief) could have been recast as one not calling for monetary relief. The plaintiff there could have done as the plaintiff in Quern v. Jordan, 440 U.S. 332 (1979), did: request as relief that the state welfare department send to all members of the class a notice that they had been

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[70/] One easy way would be the application of the canon of construction noscitur a sociis. See Sutherland Statutory Construction §47.16 (4th ed. Sands rev. 1973).

denied benefits improperly and that an administrative procedure was available under which they could demand the benefits. The Court in Jordan held this remedy was not one "which requires payment of funds from the state treasury." (The issue in Jordan was the Eleventh Amendment, which is not a bar to damages judgments against local governments. But the conclusion that notice of the availability of benefits wrongfully withheld is not a monetary remedy would apply fully in an action under the League's proposal.)

The solution is to undo Thiboutot in such as case by providing that section 1983 does not cover violations of federal law other than equal protection, no matter what kind of remedy is prayed. A similarly broad coverage is needed to solve the Owen problem of absolute liability.

CONCLUSION

We do not deny or wish to inhibit the right of the truly aggrieved victim of a violation of this civil rights to recover for his injury. Nor do we oppose the availability of the traditional equitable remedies of individual injunction and declaratory judgment to prevent future unconstitutional action. However, we submit that there is no rational basis for making the governmental entity liable where an officer or employee would not be liable for his conduct either because of his good faith or because he is absolutely immune. Making the immunities congruent is the fairest way of accomplishing the objectives of the Civil Rights Act of 1871 while eliminating the costly burden on local govenrments of defending frivolous §1983 claims.

In closing, we caution the Committee to heed the warning of the civil rights community itself, that the too-ready availability of civil rights claims, and of attorneys' fees, will influence the courts' delineation of the civil rights themselves.

In opposing, before Owen,the removal of a derivative good-faith immunity for local governments, the Committee on Civil Rights of the Association of the Bar of the City of New York reasoned:

> "Moreover, we are concerned that the creation of too broad a damage exposure for governments from §1983 violations would place unhealthy pressures upon the courts in construing the substantive scope of §1983 itself and the rights it secures. We start from the perception that, both historically and as a practical matter for the futre, the main utility of §1983 is as a foundation for injunctive and declaratory relief, both in criminal and civil litigation. While we believe it most useful to add a damage remedy against the government to the remedies available for many violations of §1983, the scope of the damage remedy created should not be so broad as to undermine the principal office of §1983 as a vehicle for defining the substantive constitutional rights of citizens.
>
> If a good faith defense is not available to governments in §1983 damage actions, theoretically a damage action against the government might be premised upon every holding by a state or federal court that the constitutional rights of a citizen have been violated. Thus, every search and seizure held to be unconstitutional, whether in a state trial court or on certiorari to the Supreme Court, might give rise to a later damage action against the government. Likewise, a court would be often unable to find that §1983 had been violated for the purpose of awarding injunctive or declaratory relief without also estopping the government in a later damage suit based upon the same violation. In the case of good faith violations of §1983, we do not believe the courts should be given only the extreme choice of denying all relief whatsoever to the plaintiff - by finding that the Constitution and §1983 have not been violated at all - or awarding not merely injunctive relief but also opening the door to substantial damage award. The desire of the courts to avoid a drain upon the public treasury might create a subtle pressure in the direction of restricting the very definition of constitutional rights in the first place.71/

71/ Civil Rights Improvement Act: Hearings on S.35 before the Subcommittee on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess., 49 (1978).

As we mentioned at the outset, NIMLO is still collecting the facts of this kind of interference with municipal operations and with the protection of legitimate civil rights occasioned by the too ready availability of absolute municipal liability and of attorneys' fees. With the permission of the Committee, we will supplement our submission today as we complete our analysis of the problem.

It is not often we local government attorneys come before the Congress. We are here to address a serious problem, and we hope the Committee will draft its solution to the Owen and Thiboutot problems with our experiences in mind.

Thank you.

FIRST ATTACHMENT TO PREPARED STATEMENT OF BATES, CUTLER AND GLINK

AMENDMENTS TO THE CIVIL RIGHTS ACT OF 1871 AND THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976: A REPORT TO THE CONGRESS BY MUNICIPAL ATTORNEYS DEFENDING §1983 CASES

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Thomas A. Bustin, City Attorney, Clearwater, Florida
Michael H. Miller, City Attorney, Gardena, California
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AMENDMENTS TO THE CIVIL RIGHTS ACT OF 1871 AND THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976: A REPORT TO THE CONGRESS BY MUNICIPAL ATTORNEYS DEFENDING §1983 CASES

The undersigned have attempted to collect material on the impact of current civil rights litigation on local governments, and to propose a draft bill which would ameliorate this adverse impact while preserving the full protection of the civil rights of these local governments' citizens.

The Civil Rights (Ku Klux Klan) Act of 1871, codified at 42 U.S.C. §1983, provides a federal cause of action for the violation by any "person" acting under color of state law of "any rights, privileges, or immunities secured by the Constitution and laws...." The Civil Rights Attorney's Fees Awards Act of 1976, amending 42 U.S.C. §1988, provides for a discretionary award of attorneys' fees to prevailing parties in §1983 cases. These provisions are attached. In Monell v. Department of Social Services, 436 U.S. 658 (1978), the Court held that local governments were persons capable of violating §1983. In Owen v. City of Independence, 445 U.S. 622 (1980), the Court held that municipal §1983 defendants could not take derivatively the good-faith immunities of their officers (who are usually co-defendants in §1983 actions). In Maine v. Thiboutot, 448 U.S. ___(Jun. 25, 1980), the Court found "laws" whose violation triggered a §1983 claim to include not only civil rights and constitutional law, but federal statutes, such as grant eligibility and distribution formulae.

I. THE NEED FOR AMENDMENT

The Owen and Thiboutot cases, we submit, wrongly changed the balance between the protection of legitimate civil rights and an excessive federal judicial interference in the operations of state and local governments. The examples in this report should make clear that the post-Owen and post-Thiboutot difficulties are not related to the enforcement of civil rights, but to the application of §1983 in areas having nothing to do with traditional civil rights. And this imbalance in favor of frivolous and marginal §1983 suits against now-defenseless governments is very costly. In a recent survey, the National Institute of Municipal Law Officers determined that $4 billion in civil rights claims are pending against 169 of its member municipalities. In some cities, the total of §1983 claims exceeds the city's operating budget. These data were submitted to the Supreme Court in NIMLO's amicus curiae brief in the City of Newport v. Fact Concerts case, No. 80-396, argued March 31, 1981. Even so, the Owen and Thiboutot problems remain.

A. The Owen Problem and the Need for Derivative Governmental Immunity

After Monell, but before Owen, a government was subject to suit under §1983, along with its officers. But, the government, which can act only through its officers, could take derivatively the same immunities the officers took. Legislators, judges and prosecutors are absolutely immune in a case seeking only monetary relief; other officials take only a qualified immunity in monetary cases, requiring the officials to show their good-faith belief that their actions were lawful. So, in Owen, the city officials were not liable for backpay to the police chief who was fired without a hearing, because the Supreme Court decisions declaring a right to a hearing were issued weeks after the chief was fired. The officials could not have predicted the course of constitutional law; so they were immunized by their good-faith belief that they had given the chief all the process he was due. But, the City of Independence was absolutely liable, because it could not take the good-faith immunity of the officers who committed the city to action.

The immunity at issue in Owen was the qualified, good-faith immunity of officials in personnel matters, and in enforcing local laws. We certainly think a local government should have the same immunity its officials have in such a case. However, a derivative governmental immunity is needed when the government official is absolutely immune, as well. For example, the rezoning of property is a legislative act, and a city council taking a rezoning action, accordingly, is absolutely immune in a §1983 case. That is as it should be, because the good faith of the council — which the councilmembers would have to prove if their immunity were only a qualified one — can be proved only by complex economic and demographic data on land use patterns and potential land uses and values. It is common knowledge that zoning challenges are very expensive for both landowners and governments, and subject to inconsistent judicial conclusions drawn from complicated expert testimony and data submitted by both sides. The liability of the city councilmembers should not be made to depend on the ability of the councilmembers when they are legislating a rezoning to predict a court's conclusion whether the application of the rezoning to a particular parcel diminished too greatly the value of the parcel. The absolute immunity of local legislators guards against such an unsure and unfair result.

The same is true for the local government itself. Therefore, we feel that the immunity of the local government should parallel that of the government officials whose actions brought the government into the §1983 suit in the first place: where the officials are absolutely immune from a monetary award, the government should be, too.

Nothing in such a legislative change — or in any attempt to change the result of Owen — would diminish the availability of an injunction against local government officials to prevent unconstitutional action. In the rezoning case, even after the change we advocate, a court would remain free to enjoin enforcement of the rezoning and to compel the city council and staff to study the matter further and to adopt some different rezoning.

B. The Thiboutot Problem and the Need for a Limitation of the Civil Rights Act to Civil Rights Violations

After Thiboutot, §1983 claims are not limited to those involving civil rights violations; Thiboutot itself involved the calculation of welfare benefits. In combination with the result of the Owen case, this means that local governments are defenseless against claims for monetary relief based onthe administration of many grant programs and other programs provided by federal statutes. Where the error of the local goverment is clear, the monetary payment is not unjust, although private actions under §1983 still would be the least desirable way for the relief to be awarded. However, it does not take much imagination to think of cases where the error would by no means have been clear to — and, therefore avoidable by — the government officials mkaing the decisions later challenged in the §1983 action.

For example, a plaintiff might claim that his federal right to cleaner air (grounded in the Clean Air Act) was impaired by a state's or city's failure to enforce pollution restrictions more vigorously, as by inspecting the emission control devices on all automobiles. In a §1983 action, the plaintiff would not be bound by any doubt the federal EPA might have whether such an enforcement policy was lawful or cost-beneficial. Many of the actions by local government officials in federal programs are taken pursuant to federal requirements. Yet, federal officials cannot be sued in §1983 actions. Therefore, local governments will be absolutely liable after Thiboutot, even where the federal officers and agencies issuing the directives which local officials merely followed, cannot be joined in the same action and cannot be made to share responsibility, and where the local officials themselves would have the benefit of the good-faith immunity denied to the government itself under Owen.

C. The Magnitude of Civil Rights Claims After Owen and Thiboutot

NIMLO has begun a survey of pending cases under the Civil Rights Acts; partial results were presented to the Supreme Court of the United States in City of Newport v. Fact Concerts, Inc., No. 80-396 (argued March 31, 1981), and the NIMLO survey still is not complete. The reports are from only 199 NIMLO members so far out of a total membership of over 1600 and these 199 report a total of $4,210,459,158 in damage claims. Of these governments, 38 report $1,042,945,700 in punitive damage claims. We are setting forth this list for your information but we must point out that it does not include the many equitable claims against these cities under the Civil Rights Act for which there is no estimate and which in fact many municipal attorneys point out is an amount which will far exceed the total claims. Many examples of equitable claims are given in The Local Government Liability Explosion and a Plan to Cope With It: Report and Recommendations by the Committee to Study Creation of a National Municipal Legal Defense Fund. Some of these civil rights equitable claims are described on pages 19-21 of the report by that Committee. As outlined in that Report also are the many non-civil rights actions which can now be brought under Maine v. Thiboutot, 448 U.S. ___(June 25, 1980) and which are difficult to estimate in total but we believe the total will far exceed the damage claims reported herein as follows:

NIMLO SURVEY OF PENDING CLAIMS UNDER THE CIVIL RIGHTS ACTS

[The population and general revenues data for cities are, generally, for 1975 (population) and 1976-77 (revenues), and are taken from International City Management Association, The Municipal Year Book 1980, at 9-44. The data for counties are, generally, for 1975 (population) and 1975-76 (revenues), and are taken from International City Management Association, The County Year Book 1978, at 8-40. In a few cases (marked *), population data are taken from the Bureau of the Census, Census of Population - Number of Inhabitants (1970). Blanks indicate unavailable data. In a few cases (marked **), revenue data are taken from the 1977 Census of Governments Survey, Bureau of the Census.]

City	Dollar Amount of Civil Rights Claims Now Pending	Population	General Revenues
Arizona			
Phoenix	$ 160,000,000	665,000	$ 228,508,000
Tempe	2,550,000	84,000	23,113,000
Tucson	1,865,000	296,000	100,979,000
Arkansas			
DeQueen	2,599,150	3,863*	518,000**
California			
San Francisco	520,612,000	665,000	798,408,000
Los Angeles	200,000,000	2,727,000	1,158,197,000
Los Angeles County	59,228,000	6,987,000	2,861,180,000
Fairfield	10,200,000	50,000	10,561,000
San Jose	8,756,500	556,000	197,886,000
El Segundo	7,110,000	15,000	10,226,000
Marin County	5,000,000	220,000	66,071,000
Alhambra	4,651,600	61,000	18,662,000
Roseville	4,260,000	20,000	6,710,000
Vallejo	3,242,600	71,000	17,011,000
San Bernardino	2,260,000	102,000	37,375,000
El Monte	1,600,000	68,000	12,430,000
San Diego	1,500,000	774,000	235,259,000
Redwood City	1,300,000	60,000	14,000,000
Duarte	1,200,000	15,000	2,721,000
San Leandro	1,002,732	67,000	18,981,000
San Luis Obispo	1,000,000	33,000	8,214,000
Burbank	953,492	86,000	32,143,000
Stockton	765,000	118,000	58,925,000
Oceanside	630,000	56,000	18,766,000
Orange Cove	600,000	3,392*	680,000**
Modesto	232,875	84,000	23,457,000
Vista	150,000	28,000	4,939,000
Sonora	50,000	3,100*	988,000**
Grover City	20,292	5,939*	1,241,000**
Sunnyvale	750	102,000	28,491,000

City	of Civil Rights Claims Now Pending	Population	General Revenues
Colorado			
Aurora	$ 25,302,000	118,000	$ 27,423,000
Colorado Springs	10,000,000	180,000	58,217,000
Denver	18,440,000	485,000	358,746,000
Northglenn	450,000	35,000	4,458,000
Golden	110,000	13,000	1,458,000
Delaware			
Wilmington	1,150,000	76,000	81,757,000
Delaware City	500,000	2,024*	406,000**
Smyrna	500,000	4,243*	498,000**
District of Columbia	45,000,000	712,000	1,557,222,000
Florida			
Clearwater	5,150,000	67,000	29,193,000
Volusia County	3,865,000	207,000	22,936,000
Jacksonville	2,546,000	535,000	220,264,000
Pensacola	2,510,000	64,000	22,353,000
Miami Beach	2,500,000	94,000	44,613,000
Hallandale	1,500,000	33,000	9,599,000
Surfside	425,000	3,614*	831,000**
Opa-Locka	300,000	14,000	3,077,000
Plantation	100,000	33,000	6,019,000
West Palm Beach	50,000	61,000	25,772,000
Homestead	18,698	19,000	8,458,000
Pensacola	10,000	64,000	22,353,000
Deland	10,000	13,000	3,471,000
Venice	5,000	11,000	3,397,000
Georgia			
Albany	5,000,000	73,000	13,276,000
Douglasville	900,000	12,000	1,843,000
Augusta	155,000	54,000	17,871,000
Hawaii			
County of Hawaii	600,000	75,000	39,617,000
Idaho			
Ketchum	3,500,000	1,454*	759,000
Illinois			
Chicago	775,093,703	3,099,000	1,228,706,000
Joliet	33,822,000	74,000	19,194,000
Peoria	1,008,000	126,000	31,367,000
St. Charles	555,000	16,000	4,077,000
Willowbrook	290,000	1,169*	1,151,000**
North Aurora	150,000	4,833*	806,000**
Waukegan	105,000	65,000	16,969,000
Carbondale	60,000	23,000	8,669,000
Hoffman Estates	50,000	32,000	4,671,000
Oak Park	40,000	60,000	16,895,000

City	Dollar Amount of Civil Rights Claims Now Pending	Population	General Revenues
Iowa			
Algona	$ 2,000,000	6,032*	$ 1,045,000**
Council Bluffs	1,601,200	59,000	19,561,000
Cedar Rapids	1,697,251	109,000	46,274,000
Ames	1,550,000	43,000	16,818,000
Sioux City	270,000	86,000	32,526,000
Waterloo	200,000	78,000	24,977,000
Kansas			
Wichita	9,939,000	265,000	84,717,000
Emporia	1,860,000	22,000	5,699,000
Hutchinson	1,450,000	41,000	9,213,000
Merriam	600,000	11,000	1,605,000
Kentucky			
Berea	141,000	6,956*	1,017,000**
Owensboro	80,000	51,000	26,207,000
Winchester	10,000	16,000	6,162,000
Louisiana			
Slidell	24,000	21,000	3,122,000
Maine			
South Portland	140,000	23,000	11,523,000
Waterville	10,000	17,000	7,106,000
Maryland			
Anne Arundel County	116,000,000	344,000	233,548,000
Prince George's County	100,000,000	678,000	469,427,000
Baltimore	70,000,000	852,000	1,082,204,000
Hagerstown	3,272,000	37,000	7,858,000
Bladensburg	100,000	7,488*	606,000**
Annapolis	10,000	32,000	8,734,000
Massachusetts			
Methuen	2,000,000	35,000	19,718,000
Michigan			
Flint	15,600,000	174,000	141,484,000
Lathrup Village	5,500,000		1,161,000**
Saginaw	2,000,000	86,000	36,070,000
Kalamazoo	1,500,000	80,000	24,888,000
Plymouth	250,000	12,000	2,982,000
Muskegon County	250,000	157,000	31,972,000
Minnesota			
Duluth	1,800,000	94,000	46,677,000
Rochester	171,000	56,000	15,189,000

City	Dollar Amount of Civil Rights Claims Now Pending	Population	General Revenues
Mississippi			
Jackson	$ 600,000	167,000	$ 65,440,000
Missouri			
Columbia	201,000,000	63,000	16,248,000
Independence	40,000,000	111,000	28,133,000
St. Louis	40,000,000	525,000	294,518.000
Kansas City	12,500,000	473,000	254,463,000
Berkeley	7,040,000	15,000	3,252,000
Springfield	2,501,000	132,000	48,468,000
Jennings	480,000	18,000	3,583,000
Hazelwood	300,000	14,000	2,799,000
Nebraska			
Central City	1,500,000	2,803*	521,000**
Lincoln	600,000	163,000	58,785,000
Omaha	507,500	371,000	117,720,000
Nevada			
Sparks	15,000,000	32,000	10,009,000
Las Vegas	1,250,000	146,000	41,604,000
New Jersey			
Newark	14,050,000	340,000	368,931,000
Hamilton	15,000	84,000	16,005,000
New Mexico			
Albuquerque	20,993,000	279,000	105,852,000
Grants	2,000,000	8,768*	2,233,000**
Farmington	1,000,000	28,000	16,522,000
New York			
New York City	251,259,465	7,482,000	14,329,999,000
Scarsdale	1,780,000	19,000	7,646,000
North Carolina			
Greensboro	32,000,000	156,000	32,435,000
Fayetteville	30,386,000	66,000	13,963,000
Charlotte	11,489,000	281,000	104,159,000
Wilson	7,560,323	34,000	9,616,000
New Bern	2,270,261	17,000	2,902,000
Goldsboro	1,800,000	26,000	7,261,000
Pembroke	1,560,000	1,982*	431,000**
Reidsville	1,100,000	13,000	3,068,000
Fayetteville	300,000	66,000	13,963,000
Gastonia	155,000	49,000	8,875,000
North Dakota			
Minot	80,000	33,000	11,126,000

City	Dollar Amount of Civil Rights Claims Now Pending	Population	General Revenues
Ohio			
Cleveland	$ 672,922,500	639,000	$ 986,940,000
Warrensville Heights	600,800,000	18,000	3,068,000
Dayton	29,890,000	206,000	91,268,000
Solon	22,000,000	13,000	6,091,000
Canton	13,125,000	102,000	30,298,000
Shaker Heights	907,000	35,000	10,226,000
Troy	700,000	18,000	5,055,000
Newark	600,000	39,000	7,250,000
Steubenville	350,000	28,000	9,287,000
Kettering	350,000	70,000	10,222,000
Fairborn	100,000	33,000	4,841,000
Cuyahoga Falls	50,000	47,000	10,192,000
Middletown	25,000	48,000	30,742,000
Oklahoma			
Oklahoma City	20,511,967	366,000	161,357,000
Edmond	2,179,520	23,000	5,375,000
Del City	1,907,889	30,000	2,909,000
Enid	201,500	48,000	8,065,000
Geary	115,000	1,380*	79,000**
Oregon			
Portland	61,505,997	357,000	140,339,000
Lake Oswego	750,160	19,000	6,117,000
Gresham	224,636	23,000	5,425,000
Pennsylvania			
Philadelphia	100,000,000	1,816,000	1,212,708,000
Allentown	675,000	107,000	22,881,000
Pittsburgh	180,000	459,000	151,088,000
Rostraver Township	10,000	10,525*	899,000*
Rhode Island			
Newport	5,000,000	29,000	25,405,000
South Carolina			
Greenville	1,226,800	59,000	15,263,000
Spartanburg	100,000	47,000	11,239,000
Tennessee			
Jackson	5,000,000	43,000	38,121,000
Franklin	475,000	12,000	2,451,000
Knoxville	360,000	183,000	93,206,000
Nashville & Davidson County	250,000	423,000	289,873,000
Waverly	200,000	3,794*	584,000*

City	Dollar Amount of Civil Rights Claims Now Pending	Population	General Revenues
Texas			
Houston	$ 60,000,000	1,327,000	$ 410,987,000
Dallas	59,000,000	813,000	274,618,000
Fort Worth	11,347,865	358,000	112,940,000
Amarillo	10,100,002	139,000	52,976,000
San Antonio	7,000,000	773,000	161,251,000
Pasadena	6,650,000	95,000	15,669,000
Plano	7,500,000	37,000	8,579,000
Grand Prairie	5,880,000	57,000	23,202,000
El Paso	5,757,000	386,000	77,681,000
McAllen	5,039,932	49,000	18,810,000
Waco	1,625,000	98,000	27,549,000
Castroville	1,500,000	1,893*	128,000**
Richardson	1,500,000	59,000	11,510,000
Arlington	455,000	111,000	22,464,000
Hurst	225,000	28,000	5,001,000
Victoria	175,000	45,000	8,382,000
Utah			
Salt Lake City	8,960,398	170,000	48,359,000
Logan	451,000	24,000	3,386,000
Vermont			
Montpelier	140,000	8,609*	2,357,000**
Virginia			
Roanoke	9,961,750	101,000	82,766,000
Arlington County	2,000,000	156,000	125,983,000
Norfolk	1,440,055	287,000	217,811,000
Portsmouth	1,310,000	109,000	78,604,000
Charlottesville	250,000	42,000	28,604,000
Carroll County	200,000	24,000	7,852,000
Loundoun County	20,000	49,000	24,149,000
Washington			
Vancouver	100,000	48,000	14,678,000
Tacoma	45,000	151,000	64,637,000
West Virginia			
Logan	600,000	3,311*	614,000**
Buckhannon	250,000	7,261*	912,000**
Wisconsin			
Brown County	35,530,000	169,000	33,339,000
Green Bay	715,000	91,000	65,673,000
Brookfield	180,000	33,000	8,815,000
Whitefish Bay	25,000	17,000	3,019,000
Wisconsin Dells	20,000	2,401*	997,000**
Wyoming			
Casper	3,800,150	41,000	14,011,000
Jackson	2,800,000	2,101*	1,583,000**
Powell	500,000	4,807*	993,000**
	$4,784,169,125		

Total Current Civil Rights Claims Against 200 Municipalities

PUNITIVE DAMAGES REPORTED IN NIMLO SURVEY

City	Punitive Damages Claimed
Arizona	
Tempe	$ 1,400,000
California	
San Jose	2,565,000
El Segundo	1,100,000
Vallejo	1,000,000
Stockton	600,000
Redwood City	300,000
Orange Cove	150,000
Delaware	
Smyrna	250,000
Wilmington	200,000
Illinois	
Joliet	30,115,000
North Aurora	100,000
Carbondale	55,000
Iowa	
Waterloo	100,000
Florida	
Pensacola	1,000,000
Kansas	
Hutchinson	1,450,000
Emporia	1,000,000
Maryland	
Hagerstown	770,000
Michigan	
Saginaw	500,000
Lathrup Village	5,500,000
Missouri	
Columbia	100,500,000
Jennings	320,000
New York	
New York City	346,000,000
North Carolina	
Fayetteville	3,000,000
Goldsboro	1,000,000
Ohio	
Cleveland	436,355,000
Warrensville Heights	100,000,000
Troy	600,000
Cuyahoga Falls	420,000
Steubenville	100,000

City	Punitive Damages Claimed
Oklahoma	
Edmond	$ 1,125,700
Oregon	
Lake Oswego	1,600,000
Tennessee	
Franklin	295,000
Waverly	50,000
Texas	
Plano	1,000,000
Houston	200,000
Utah	
Logan	150,000
Virginia	
Portsmouth	525,000
Charlottesville	100,000
West Virginia	
Logan	300,000
Wisconsin	
Brookfield	150,000
	$1,046,945,700

Total Punitive Damages
Currently Claimed Against
40 Municipalities

D. The Problem of Court-Awarded Attorneys' Fees

The theory of a court award of attorneys' fees to a prevailing civil rights plaintiff under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, is that the fees are necessary to encourage private attorneys to take civil rights cases, especially cases with little monetary claim (which would have formed a base for an attorneys' fee by agreement of the plaintiff and his attorneys), but which litigate important principles of constitutional law. In theory, the fee is withheld unless the plaintiff shows that his case advanced his own interests (at least) or the interest of society at large.

In practice, fees are awarded without this showing of a change for the better as a result of a plaintiff's suit. The amount of the fee awarded is not, and cannot under present law be, limited according to the extent of the tangible relief obtained.

This discrepancy between the promise of the Fees Act and its implementation by the courts will remain even if the Civil Rights Act were amended to solve the Owen and Thiboutot problems. An additional problem will arise under the Fees Act after the Owen problem is solved by restoring some immunity from damages to local governments sued under §1983. Attorneys' fees have been awarded against governments which were immune from damages. So, by itself, an amendment to the Civil Rights Act will not make governments, immunized from damages, immune from attorneys' fees.

Finally, the active involvement of plaintiffs' civil rights organizations in the financing of §1983 cases calls into question the continuing validity of Congress' finding in the 1976 Fees Act that encouragement of litigation was necessary to vindicate civil rights. Organizations, we have been told, have been paying local private attorneys during the conduct of civil rights cases; the private attorneys then claim court-awarded fees for themselves, not for the organizations. These organizations, then, are showing themselves financially able to litigate §1983 cases without court-ordered fees.

For these reasons, elaborated below, local government attorneys we have spoken with feel an amendment to the Fees Act should accompany amendments to §1983.

1. The Courts are Administering the Fees Act to Require Payment by Local Government Beyond That Necessary to Accomplish Congress' Purpose in Enacting the Act.

Congress intended in the Fees Act to encourage plaintiffs to bring meritorious civil rights cases by authorizing courts to award plaintiffs attorneys' fees, presumably the same fees plaintiffs would have paid themselves had they been able to do so. The two elements of this congressional purpose are: (1) fees only for meritorious cases; (2) fees approximating market rates.

As the Fees Act is being implemented, neither purpose is furthered.

(1) Fees are awarded on only the most tangential showing of a connection between the plaintiffs' case and a change in government policy. Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980), cert. denied, No. 80-653 (only event in case a preliminary injunction; further proceedings moot because police investigation using challenged search practices was concluded). Certainly, plaintiffs, to obtain fees, need not obtain an injunction requiring a change in government conduct. Beyond the obvious case of settlement, plaintiffs have been awarded fees under a "catalyst" theory that their suit prompted a self-administered remedy by the civil rights defendant. Parham v. Southern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970). It is easy for a court to cite Congress' desire for generosity, while relaxing the requirement of a connection between the suit and the change in government policy to the point of evaporation. At that point, a meritless claim generates attorneys' fees. Bagby v. Beal, 606 F.2d 411 (3rd Cir. 1979); Darensburg v. Dufrene, 460 F.Supp. 662 (E.D. La. 1978) (voluntary compliance with demands); Criterion Club v. Board of Comm'rs, 594 F.2d 118 (5th Cir. 1979)(legislative amendment). "Many courts have been willing to assume a causal relationship from chronology and other evidence (citing cases)," Questions Surround "Prevailing Party" Language in Civil Rights Attorney's Fees Awards Act, Committee Report No. 37, Lawyers' Committee for Civil Rights Under Law, 4 (April 1980).

(2) In private litigation, plaintiffs' attorneys' compensation varies with the recovery obtained. This matching of result and fee is impossible in cases not involving monetary relief. To the contrary, bonuses or multipliers of usual hourly rates, are routinely awarded. Neely v. City of Grenada, 624 F.2d 547 (5th Cir. 1980).

Even cases undertaken solely to obtain damages (not to effect a change in government operations) will produce court-awarded fees bearing no relation to the damages recovered. In Furtado v. Bishop, 635 F.2d 915 (1st Cir. 1980), the court rejected a cap on fees of 1/2 of the judgment obtained, even while recognizing that the standard, private litigation, 1/3 contingency fee arrangement applies precisely this cap. As a result, the court awarded a $21,000 fee for obtaining $27,000 in damages. See also Copeland v. Marshall, No. 77-1351 (D.C. Cir. Sep. 2, 1980)(en banc)(award of $160,000 fee for obtaining $33,000 backpay); Coop v. City of South Bend, 635 F.2d 652 (7th Cir. 1980)($6000 fee for obtaining $510 damages).

(2) Fees Can Be Awarded Against Governments Immune from Damages

The leading case is Entertainment Concepts v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), pet. for cert. filed No. 80-1039. There, the Court of Appeals reversed denial of an award of attorneys' fees against local officials who were immune from liability because they had acted in good faith.

This same result could be reached against local governments provided a good-faith immunity by an amendment to the Civil Rights Act to solve the Owen problem.

Therefore, an amendment to the Fees Act is needed as well.

II. THE AMENDMENT NEEDED

Under one proposal to amend §1983, to limit protection against the Thiboutot and Owen problems to claims for "monetary relief", the same claim brought in Thiboutot (that welfare eligibility was miscalculated and an entire class was entitled to relief) could have been recast as one not calling for monetary relief. The plaintiff there could have done as the plaintiff in Quern v. Jordan, 440 U.S. 332 (1979), did: request as relief that the state welfare department send to all members of the class a notice that they had been denied benefits improperly and that an administrative procedure was available under which they could demand the benefits. The Court in Jordan held this remedy was not one "which requires payment of funds from the state treasury." (The issue in Jordan was the Eleventh Amendment, which is not a bar to damages judgments against local governments. But the conclusion that notice of the availability of benefits wrongfully withheld is not a monetary remedy would apply fully in an action under this proposal.)

The solution is to undo Thiboutot in such a case by providing that section 1983 does not cover violations of federal law other than civil rights laws, no matter what kind of remedy is prayed. A similarly broad coverage is needed to solve the Owen problem of absolute liability.

A. The Harm to Civil Rights Protection if the Owen and Thiboutot Problems Are Not Resolved

It would be sufficient cause to seek a resolution of the Owen and Thiboutot problems that they contribute substantially to a $4 billion drain on local government treasuries. However, proponents of a more vigorous use of §1983 against local governments should also join in a solution to these problems.

There is a widespread, and well-placed, fear in the civil rights community that the too-ready availability of civil rights claims, and the attendant attorneys' fees, will influence the courts' delineation of the civil rights themselves.

In opposing, before Owen, the removal of a derivative good-faith immunity for local governments, the Committee on Civil Rights of the Association of the Bar of the City of New York reasoned:

> "Moreover, we are concerned that the creation of too broad a damage exposure for governments from Section 1983 violations would place unhealthy pressures upon the courts in construing the substantive scope of Section 1983 itself and the rights it secures. We start from the perception that, both historically and as a practical matter for the future, the main utility of Section 1983 is as a foundation for injunctive and declaratory relief, both in criminal and civil litigation. While we believe it most useful to add a damage remedy against the government to the remedies available for many violations of Section 1983, the scope of the damage remedy created should not be so broad as to undermine the principal office of Section 1983 as a vehicle for defining the substantive constitutional rights of citizens.

> If a good faith defense is not available to governments in Section 1983 damage actions, theoretically a damage action against the government might be premised upon every holding by a state or federal court that the constitutional rights of a citizen have been violated. Thus, every search and seizure held to be unconstitutional, whether in a state trial court or on certiorari to the Supreme Court, might give rise to a later damage action against the government. Likewise, a court would be often unable to find that Section 1983 had been violated for the purpose of awarding injunctive or declaratory relief without also estopping the government in a later damage suit based upon the same violation. In the case of good faith violations of Section 1983, we do not believe the courts should be given only the extreme choice of denying all relief whatsoever to the plaintiff — by finding that the Constitution and Section 1983 have not been violated at all — or awarding not merely injunctive relief but also opening the door to a substantial damage award. The desire of the courts to avoid a drain upon the public treasury might create a subtle pressure in the direction of restricting the very definition of constitutional rights in the first place.

Civil Rights Improvement Acts: Hearings on S.35 before the Subcommittee on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 2d. Sess., 49 (1978).

B. Proposal Drafted by this Committee

The attached bill marked *Municipal Attorney Draft Bill* does the following things. Section 2(a) merely makes the punctuation changes necessary to add to the language of §1983.

Section 2(b) solves the *Thiboutot* problem in much the same fashion as Senator Hatch's S.584 by limiting the federal "laws" to "civil rights" laws.

Section 2(c) adds language providing a derivative immunity, good-faith or absolute, to government §1983 defendants. The good faith immunity is specified, but immunity is provided whenever the officials are immune.

Section 3 of the Municipal Attorney Draft Bill addresses a problem not taken up by the bills of Senator Hatch. The impulse to file frivolous §1983 actions is emboldened by the prospect of attorneys' fees in successful actions. This incentive to questionable litigation should be removed. This is done by amending §1988 to limit the discretionary award of fees to awards against the United States in enforcement of actions under Title VI of the Civil Rights Act of 1964. This amendment would have the effect of freeing local governments from frivolous suits by private plaintiffs under §1983, but, at the same time, providing these governments reimbursement for their fees in defending frivolous actions brought against them by the United States to enforce grant conditions.

Respectfully submitted,

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Appendix A

CIVIL RIGHTS ACT OF 1871, 42 U.S.C. §1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Appendix B

CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976, 42 U.S.C. §1988

§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], ~~or in any civil action or proceedings, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code~~, or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(R.S. § 722; Pub. L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641.)

Appendix C

MUNICIPAL ATTORNEY DRAFT BILL TO AMEND SECTIONS 1983 and 1988

A Bill

To amend Sections 1979 and 722 of the
Revised Statutes to limit the liability
of states and political subdivisions
and to limit attorney's fees in actions
alleging violations of civil rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as "The Civil Rights and Attorney's Fees Awards Amendments of 1981."

SEC. 2. That the Revised Statutes Section 1979 (42 U.S.C. 1983) as amended is amended further as follows:

(a) By inserting "(a)" immediately before "every", and by striking the period after "Columbia" and inserting in lieu thereof ";";

(b) By adding the words "civil rights" immediately before "laws"; and

(c) By adding at the end thereof the following new subsection:

"(b) In any action, suit or proceeding under the provisions of this Section, a State or a political subdivision of a State, including a municipality, county, town, borough, parish, village or school district, shall be immune from liability for damages or any other relief where the act complained of was performed in good faith by its officials or employees, or where the officials or employees are themselves immune from liability under this section.

SEC.3. That the Revised Statutes Section 722 (42 U.S.C. 1988) as amended is amended further by striking the following. "to enforce a provision of sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, title IX of Public Law 92-318," by striking "or" immediately preceding "title VI of the Civil Rights Act of 1964" and inserting in lieu thereof the following:" by or on behalf of the United States of America, to enforce, or charging a violation of,"

Appendix D

RESOLUTION OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS SUPPORTING AMENDMENT OF THE CIVIL RIGHTS ACT OF 1871 AND THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976, 42 U.S.C. §§1983 and 1988

WHEREAS, the 1600 local governments which are members of the National Institute of Municipal Law Officers and which participate in the work of NIMLO through their chief legal officers are concerned that the Civil Rights Act of 1871 as construed in recent decisions by the Supreme Court of the United States will adversely affect all local governments in ways which were not brought to the attention of the Court in recent cases and which are only now becoming apparent;

WHEREAS, NIMLO in surveying its members has determined that claims under the Civil Rights Act, 42 U.S.C. §1983, now pending, amount to $4 billion for 199 local governments, in some cases the civil rights claims exceeding the operating budgets of smaller municipalities;

WHEREAS, the easy availability of attorneys' fees in §1983 cases encourages the filing of frivolous claims of this magnitude;

WHEREAS, excessive judicial intrusion caused by the strict liability concepts of the referred to Supreme Court decisions compounded by attorney fee availability will distort municipal decisionmaking and restrict the independence of local governments and their ability to respond to community needs;

WHEREAS, a special committee of municipal attorneys has considered the problem and the needed legislative solution, in the report attached to this resolution;

NOW THEREFORE BE IT RESOLVED that the National Institute of Municipal Law Officers urges the Committees on the Judiciary of the House and the Senate to give early and careful consideration to the bill appended to the report of the municipal attorneys attached to this resolution, and to the supporting reasons set out in the report itself, and further urges that the Committees consider data illustrative of the civil rights litigation problem now facing local governments, data of the kind mentioned in the attorneys' report.

Adopted April 12, 1981 at Washington, D.C.

SECOND ATTACHMENT TO PREPARED STATEMENT OF BATES, CUTLER AND GLINK

FRIVOLOUS CLAIMS AND INEQUITABLE FEE AWARDS AND DENIALS: RESULTS OF A QUESTIONNAIRE BY THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS ON CIVIL RIGHTS LITIGATION UNDER RECENT SUPREME COURT DECISIONS

In response to a request of the Committee for additional factual material regarding frivolous 1983 claims and the inequitable application of the Civil Rights Attorney's Fees Awards Act of 1976, NIMLO sent the attached questionnaire to its members (Exhibit A). The questionnaire generally sought (1) examples of frivolous 1983 claims against cities and the difficulty experienced by the governmental defendant in getting such claims dismissed; (2) instances where attorneys' fees had been denied prevailing governmental defandants; (3) a comparison between the amount of damages claimed and the amount awarded; and (4) instances of unusually large attorneys' fees awards in relation to the amount of damages awarded against the city.

The nature of the responses does not lend itself to statistical analysis. Rather, a narrative summary of the responses is provided. The responses, and pleadings where included, are attached as Exhibits to the Summary. The responses support our conclusion that the availability of attorneys' fees and the inequitable implementation of the Fees Act encourage the bringing of frivolous 1983 suits against cities, We urge the Committee to review the Exhibits. They will speak for themselves, perhaps more effectively than any attempt to summarize them. These materials show the need of municipalities for amendments to the federal laws to restrain frivolous cases and fees claims, against which, under recent Supreme Court decisions, municipalities are now defenseless. The amendments which would address these problems adequately would provide a defense to municipalities on the same terms as their officers are now insulated from frivolous claims, and would restrain attorneys' fees in meritless cases.

NIMLO is still receiving and processing answers to this questionnaire. And, NIMLO will update this summary of responses to cover all answers received by the time the hearing record before this Committee closes.

Frivolous 1983 Claims

In most cases responses to the request for examples of frivolous 1983 claims reluctantly characterized pending claims as frivolous either because the case was pending or, we suppose, because of the serious regard that cities have for 1983 claims.

Nevertheless, the city of Norfolk, Virginia identified a claim under 1983 (Exhibit B) seeking $10,000,000 for what appears from the 15 page complaint of the pro se petitioner to be a grievance stemming from an alleged violation of state law (a tax foreclosure) many years ago.

Wichita, Kansas is a defendant in a class action under 1983, seeking in excess of $6,000,000 plus attorneys' fees. The suit arises out of the city's action in seeking a Urban Development Action Grant from the U.S. Department of Housing and Development to assist a private corporation in constructing a gasohol plant and the decision to locate the plant in a predominantly black community thereby necessitating condemnation of plaintiffs' property. Black plaintiffs allege a conspiracy on the part of the white community to intentionally locate the plant in the black community, knowing it will be injurious to the health, safety and welfare of black residents. Plaintiffs also seek to permanently enjoin the project. This suit also provides an example of the expense, not only for defense but for delays in municipal projects, caused by plaintiffs' procedural delays. After the city filed a motion for summary judgment, the plaintiffs requested an extension for their response in order to file a motion for class certification and to have the motion decided prior to the summary judgment motions. (Exhibit C)

A suit against the City of Kalamazoo, Michigan seeks $1,500,000 in damages as a result of the presence of two police officers inside a dwelling for approximately ten minutes during which time no one was injured and no property was taken. (Exhibit D)

A pending suit against the City of Aurora, Colorado under 1983 seeks $1,600,000 plus attorneys' fees. The suit alleges violations of the plaintiff's Fourth, Sixth and Fourteenth Amendment rights and assault and battery arising out of the impoundment of the plaintiff's dogs and subsequent confinement of plaintiff at a mental health facility for observation for 72 hours. When the dogs were impoundment they were apparently housed, along with considerable amounts of trash and rubbish, with the plaintiff in the plaintiff's car. (Exhibit E)

The City of Delaware City, Delaware was a defendant in a suit under 1983 seeking $2,000,000 for an incident involving the towing of junked vehicles. After a six day jury trial, the jury found for the city on the constitutional issues and awarded the plaintiff $1,500 on a pendent state claim for conversion (the city had previously expressed its willingness to pay the plaintiff for the value of the towed cars). (Exhibit F)

A suit was filed under 1983, seeking $800,000, against the City of Daytona Beach, Florida by a bartender who was arrested for selling alcoholic beverages without a license. The city was denied a motion for summary judgment despite sworn testimony clearly indicating that liquor was sold without a license. After a two day presentation of the plaintiff's case, the city was granted a directed verdict. The city attorney observed that the case would undoubtedly have been dismissed before trial in a state court due to the availability of judicial notice of local facts and people (the federal court was some 60 miles from Daytona Beach) and more ample opportunity for motion practice and argument. (Exhibit G)

The City of Sioux City, Iowa was involved in two 1983 suits which are illustrative of the difficulty governmental defendants experience in getting frivolous cases dismissed by the courts. One case involved the discipline of an employee for failure to cooperate in an investigation of a citizen complaint against the employee. The city was ultimately successful in a motion for summary judgment. However, it was noted that the court was reluctant to dismiss such cases and the city's success was attributed to the agreement between the parties on the factual issues. Lack of agreement on the factual issues forced the city to settle another 1983 suit involving a challenge to the enforcement of a municipal ordinance. Despite discovery indicating that the defendant officers did no more than enforce an existing city ordinance, the city's motion for summary judgment was denied primarily because the plaintiff maintained that there were still factual issues in dispute that a jury ought to resolve. The case was settled for a nominal sum in comparison to the claim made. (Exhibit H)

Stockton, California spent three years defending the action of its police officers who arrested the plaintiff based on a citizen's arrest.

The suit arose out of the plaintiff's refusal to pay for food consumed in a restaurant. The restaurant owner signed a citizen's arrest form but failed to sign a formal complaint and the plaintiff was released. The plaintiff sued the city alleging false arrest. The city was granted a motion for summary judgment. Despite the city's success from the start, the plaintiff amended his complaint alleging negligence for failure to preserve evidence (the half-eaten food) that plaintiff contended would have proven civil liberty of the restaurant owner in a separate proceeding against him. The city was again successful and the judgment was affirmed on appeal. Thereafter, the plaintiff sued the city under 1983 alleging deprivation of constitutional rights by policy or custom of the city and the police department. The city again prevailed. (Exhibit I)

Loudoun County, Virginia identified a suit in which the county, the County Administrator, the Fire Marshall and the eight members of the Board of Supervisors are defendants, seeking $355,800 in compensatory damages and punitive damages of $1,750,000 and attorneys' fees. The suit arises out of the discharge of a county employee for insubordination pursuant to the county personnel policy. The plaintiff filed a grievance under the state-approved grievance procedure. The grievance panel agreed that the plaintiff's actions warranted discipline but recommended only a three month suspension without pay. The plaintiff was reinstated and resigned three months later. The suit alleges that he was entitled to a pre-termination hearing. The suit contains five counts and 157 numbered allegations. One count alleges violation of 1983 and the other four allege violations of state and local laws, conspiracy and tortious interference. (Exhibit J)

The City of Fayetteville, North Carolina faces two claims under 1983 for a total of $30,186,000 in damages growing out of state court criminal convictions which have been upheld on appeal. The constitutional claims were raised and decided unfavorably for the plaintiffs in the state court appeals. (Exhibit K)

The City of Duarte, California is a defendant in a 1983 action seeking $1,400,000 involving the demolition of a deteriorated building found to be in violation of building, public health and safety codes. The city complied with all due process requirements. Plaintiffs failed to reply to the city's notices. (Exhibit L)

The appeal of the dismissal of an action against the City of Paducah, Kentucky, filed in 1969 by a pro se plaintiff, is currently pending before the U.S. Court of Appeals for the Sixth Circuit. The case was dismissed by the District Court in 1980. Six months later, the Sixth Circuit dismissed the appeal on its own motion as frivolous and entirely without merit. The petitioner filed a motion for reconsideration in which he reviewed the alleged instances of discrimination against him. The court reinstated the appeal and appointed counsel. (Exhibit M)

A 1983 suit was brought against the City of Golden, Colorado challenging the city's solicitation ordinance as applied to members of the Unification Church. The city stipulated to a resolution of the cases which would have allowed church members to solicit door-to-door subject to identification and registration requirements. In the stipulation, plaintiff's counsel had agreed to a bifurcated hearing on the attorneys' fees issue. However, the judge refused to approve the stipulation, forcing the city to litigate the case and ultimately pay $1,000 in attorneys' fees to plaintiffs' counsel (Exhibit N)

The City is also involved in a pending challenge to the solicitation ordinance by a nonprofit organization which filed suit without even seeking an administrative determination of their exempt status. Upon notification of plaintiffs' counsel that in all likelihood an exemption would have been granted, the city was informed that the plaintiffs would settle for, among other conditions, payment of $4,000 attorneys' fees. (At that point it appeared that counsel for plaintiffs had done no more than file the five page Complaint.) (Exhibit N) The City Attorney observed that, in his opinion, the availability of attorneys' fees was the sole reason for the bringing of both suits.

Responses to the NIMLO questionnaire illustrate the use of Section 1983 to challenge all types of actions by municipal officials and employees. Exercise of municipal police powers in abating public nuisances, in compliance with procedural requirements of local laws, is the basis for many actions under Section 1983. The City of Kearney, Nebraska was sued for $150,000 in compensatory damages and $500,000 in punitive damages arising out of the city council's finding that the plaintiff's uninhabited residential dwelling was a nuisance. The city notified the plaintiff of its proposed actions and the plaintiff appeared before the council. The plaintiff alleges that he was unable to sell the property because of the city's actions and has therefore been deprived of his property without due process. (Exhibit N-1)

The towing of a parked car for violation of a city parking ordinance is the basis for a suit under Section 1983 against the City of Corvallis, Oregon. The plaintiff alleges that he was entitled to preseizure notice and hearing. (Exhibit N-2)

Personnel actions taken by the municipality as employer provide another basis for the assertion of claims against municipalities under Section 1983. The City of San Leandro, California was sued by a former CETA employee alleging discrimination, harassment and conspiracy by the city in allegedly informing prospective employers that the plaintiff was a troublemaker and by relocating plaintiff's desk in a small and confined space. (Exhibit N-3)In a suit against the City of Kansas City, Kansas by a former black employee who was terminated for insubordination, which he admitted, to his black supervisor, the court has required submission of facts and evidence in connection with the city's motion for summary judgment. (Exhibit N-4)

Imaginative plaintiffs will make every effort to allege an action, or in some cases inaction, by a city to bring what may be no more than a grievance between individuals against the city. The City of Parma, Ohio was a defendant in a suit under Section 1983 which was essentially a suit between neighboring landowners involving surface water drainage problems. The complaint alleged that the city "failed to exercise its duty to provide the plaintiff with municipal services" and sought to enjoin the city from permitting the circumstances. The city had previously been dismissed from a suit in the state courts involving similar issues. The city was also joined as a defendant in a suit by a private landowner in a state court against a telephone company over blockage by the telephone company's underground cable of the landowner's access to sewer connections. The city did not control the positioning of the cable, and plaintiff's counsel admitted that he joined the city to encourage the city to act on the plaintiff's behalf. When faced with a motion to dismiss based on state law immunity, the plaintiff amended the complaint to allege constitutional violations which were never detailed. (Exhibit N-5)

THE NEED FOR IMMUNITY

Under Owen, a city may not assert the good faith of its officers and employees in an action against the city under Section 1983. A recent decision of the U.S. Court of Appeals for the Fifth Circuit and several responses to the questionnaire sent to NIMLO members illustrate the problem created by Owen and the need for derivative absolute or good faith immunity for the municipality.

The Fifth Circuit recently held that a mayor, exercising his veto power, is absolutely immune from suit but that the city lacks any immunity in an action under Section 1983 challenging the failure to rezone the plaintiff's property. Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981). The plaintiff requested a rezoning of his property on several occasions over the course of several years. On two occasions, the mayor vetoed an ordinance passed by the city council that would have rezoned the property. Plaintiff filed a suit in state court seeking an injunction to compel the rezoning. The court held that the city's actions were arbitrary and capricious and had deprived the plaintiff of all practical use of his property.[1]

While the state court action was pending, the plaintiff sued the mayor and the city under Section 1983 alleging violation of his Fifth and Fourteenth Amendment rights. The District Court, which decided the case prior to Owen, held that the Mayor was absolutely immune and that the city was immune in exercising its legislative functions.[2]

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[1] The decision of the trial court was reversed on appeal.

[2] The District Court held that the city was entitled to immunity where the claim was based on the city's failure to act promptly rather than its affirmative enactment of an unconstitutional law or official policy. 643 F.2d at 1194.

Based on the decision in Owen, the Fifth Circuit affirmed as to the Mayor but reversed as to the city.

A Wilmington, Delaware police officer and two state prosecutors were sued by a convicted prisoner claiming $1,000,000 in damages. The suit alleged violation of the plaintiff's constitutional rights arising out of an *ex parte* conference between the judge, prosecutors and the officer, who attended at the direction of the prosecutors, during the plaintiff's trial. The prosecutors were dismissed at the outset based on absolute prosecutorial immunity. The suit was ultimately dismissed against the city officer upon proof of his good faith. Although this case occurred prior to Owen, were it to occur today, undoubtedly the city would also be sued, and, under Owen, would have no good faith defense. (Exhibit N-7) So, the city would remain as a defendant long after the individual defendants taking the challenged action had been dismissed. This case shows why an amendment on the order of S.585 is needed, simply to insure fairness.

A similar case pending against the city of Abilene, Texas further illustrates the dilemma of the defenseless municipality. The city is a defendant in a suit arising out of raids by city police officers of an adult bookstore at the direction of the Criminal District Attorney. The District Attorney, an elected state official, will be afforded an absolute or qualified immunity, leaving the police officers to establish their good faith defense. (Exhibit N-8)

The City of San Leandro was sued in an action under Section 1983 arising out of a search by police officers of a neighboring jurisdiction. The city's only involvement was that a supporting affidavit for the warrant had been signed by a city police officer. (Exhibit N-3)

In each of these situations, it is not inconceivable that a court would find a "policy" of cooperation with the state or a neighboring jurisdiction in law enforcement activities to constitute a policy or custom under Monell. Without a derivative absolute or qualified immunity, the city will be liable for little more than carrying out the directions of a state official or cooperating with a neighboring jurisdiction.

THE IMPLEMENTATION OF THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT AND THE NEED FOR AMENDMENT

A recent decision of the U.S. District Court for the Eastern District of Virginia supplements the testimony of the city attorneys regarding the courts' broad interpretations of the prevailing party language of Section 1988. The court, in DeMier v. Arlington County (No. 80-1086-A, May 12, 1981), held that the plaintiffs in a Section 1983 action challenging the strip search policy of the Arlington County Sheriff were prevailing parties and awarded attorneys' fees and costs of $16,365.07 even though the case was not litigated (the plaintiffs dismissed their case with prejudice) and there was no finding of any violation of a federal right. The case was the third in a series of three cases challenging the policy. In the two earlier cases, the strip search policy was upheld. However, subsequent to the filing of the third suit, the Sheriff abolished the practice. In addition, the Virginia General Assembly enacted a state law prohibiting the use of strip searches without probable cause of persons arrested for minor offenses. These two actions were enough for the court to conclude, under Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979), that the mere pendency of the suit contributed in a significant way to the result achieved, despite the defendant's contentions that the policy change was the result of the public attention generated by the first suit. (Exhibit N-9) Fortunately for the county, it was not held responsible for the actions of the Sheriff, an elected state official, and therefore, was not liable for the fees awarded. No such result can be expected where a plaintiff successfully alleges that the carrying out by municipal officials of a policy of a state official somehow constitutes a municipal policy or custom under Monell.

COMPENSATION FOR ATTORNEY LOBBYING

In DeMier v. Arlington County, supra, the District Court included in fee-compensable time the effort of plaintiffs' attorney in lobbying the state legislature. (Exhibit N-9 , Slip op., at 7.) Thus, when a plaintiff challenges a government policy in court and simultaneously brings political pressure to bear (often unrelated to the merits of the controversy), he may be compensated by the court for the legislative lobbying. The Congress in 1976 certainly did not intend the Fees Act to fund lobbying of Congress, a legislature or a city council.

Each of these examples shows that, under the present state of the law under §1983, frivolous claims are commonly filed against local governments which have no good faith or other defense against liability. The absense of such a defense, which nonetheless remains available as it was at common law to municipal officials, forces the governments to try these frivolous cases, or what is worse, to settle them simply to avoid the cost of conducting a trial.

As the discussion below shows, the availability of attorneys' fees to frivolous plaintiffs and the denial of fees to prevailing defendants exacerbates this trend.

Inequitable Application of the Fees Act to Prevailing Government Defendants

Prevailing government defendants have been openly discouraged from seeking attorneys' fees in 1983 litigation. In the Daytona Beach, Florida case refered to above (Exhibit G), although the city prevailed, it did not file a motion for attorneys' fees of $6,500 because the court had informally indicated that it would not rule favorably. The City Attorney made several observations about the effect of the court's position: a motion for attorneys' fees might only aggravate the judge before whom the city might appear again, and the amount at stake would not have justified the expense of an appeal.

Aurora, Colorado experienced a similar "informal" ruling on the fees issue in a suit by a police officer against the city in which the city prevailed. The city sought attorneys' fees which were denied. The court commented that fees were not recoverable by governmental entities. (Exhibit E)

The city of Brooklyn Center, Minnesota was denied attorneys' fees for the successful defense of 1983 claims arising out of the denial of certain variances involving the reconstruction of a fertilizer plant. Although civil rights violations were alleged, no attempt was made to prove the 1983 claims at trial. (Exhibit O)

Given the unsuccessful experience of prevailing government defendants in recovering fees, cities have been advised not to seek fees. The Township of Hamilton, New Jersey reported that it had been so advised. (Exhibit P) The City Attorney of Wilmington, Delaware reported that he has so advised the city despite the city's success rate in the litigation of 1983 claims. (Exhibit Q)

That there is little risk involved for a plaintiff in making a 1983 claim against a city is evidenced by the experience of Delaware City, Delaware in the case referred to above. (Exhibit F) The city sought attorneys' fees for the $45,000 it spent in legal fees to defend the case. The city was awarded $9,000 which, as of this date, it has been unable to collect from the plaintiff.

Even where the city goes to trial and prevails in a Section 1983 suit, the likelihood of the city being awarded attorneys' fees is slim. The City of Wilmington, Delaware sought costs and attorneys' fees of $19,000 in a suit in which the city prevailed. The court awarded the city costs but because the plaintiffs were on welfare, refused to award attorneys' fees. (Exhibit N-7)

The Newport News, Virginia School Board was sued under Section 1983 alleging that the Board had a resegregated school system. None of the claims were dismissed at preliminary stages even though characterized by the District Court Judge as "almost frivolous." The Board prevailed on the major issue and on 18 of the 20 collateral issues. The Board's request for attorney's fees was denied. (Exhibit Q-1)

The City of Beverly Hills, California was sued under Section 1983 by plaintiffs taken into custody on the basis of a citizen's arrest. The city prevailed. Although the Court found the action "completely frivolous, it refused to award the city attorneys' fees in the belief that it would discourage the filing of civil rights actions. The suit cost the city $7,500 to defend. (Exhibit Q-2).

Moreover, even if fees are awarded, the award may be illusory given the financial status of many Section 1983 plaintiffs. Indianapolis, Indiana reported that it had not sought attorneys' fees in any cases in which the city had prevailed because all of the plaintiffs were judgment proof. (Exhibit Q-3) For this reason, at least one comment suggested that attorneys' fees not be allowed in civil rights cases. (Exhibit Q-4).

The Relation of Damage Awards to Amount Claimed

Indicative of the inflated nature of many of the claims are the reports of the amount of settlements in relation to the amount claimed. Kansas City, Kansas settled 3 suits, one for $3,500 or .2% of the amount claimed, another for $1,000 or .1% of the amount claimed and the third for $4,000 or .4% of the amount claimed. (Exhibit N-4) Parma, Ohio settled one suit for $1,600 or .2% of the amount claimed, and another for $2,000 or .04% of the amount claimed. (Exhibit N-5) Payment of even these amounts places a financial burden on most cities.

Salem, Oregon was a defendant in a 1983 suit against federal agents seeking $100,500,000. The city settled with the plaintiff for $200 or .00019% of the amount claimed. The suit arose out of the arrest of the plaintiff by federal agents for sale of stolen government bonds. The plaintiff was convicted but subsequently acquitted. The government's appeal was subsequently abandoned. The city's only involvement was the presence of a city police detective when the plaintiff was arrested, as was customary when an arrest was made by federal agents. The city expended $750 in defense of the suit, or 375% of the amount of settlement. (Exhibit R)

In the Delaware City case referred to above (Exhibit F) the plaintiff was awarded $1,500 on the pendent state claim which represented .075% of the amount claimed.

The City of Winter Park, Florida was a defendant in 1983 suit by a former employee seeking, among other relief backpay and punitive damages in excess of $750,000. The plaintiff was ultimately awarded $1.00 or .0001% of the amount claimed. The case is currently on appeal. (Exhibit S)

Ann Arbor, Michigan has identified three 1983 cases, in two of which the amount awarded was .75% of the amount claimed ($15,000 was recovered in a case involving the shooting of a fleeing felon and $7,500 was recovered in a case involving the discharge of a city employee.) A third award of $18,000 in a case involving an illegal search represented .9% of the amount claimed. (Exhibit T)

A case involving the City of Sioux City, Iowa was settled for $14,000 representing 5% of the amount claimed. Similarly, Kalamazoo, Michigan settled a case for $25,000 representing 5% of the amount claimed. (Exhibit H)

Attorneys' Fees Awards Despite Absense of Damages

The city of Royal Oak, Michigan paid $12,000 in attorneys' fees to a prevailing plaintiff in a suit challenging the city's massage parlor ordinance. No damages were awarded. (Exhibit U)

Miscellaneous Comments

1. The Cost of Defense

Numerous comments reflected the frustrations of city officials faced with the cost of the defense of frivolous 1983 suits. Given the reluctance of the courts to award attorneys' fees to prevailing government defendants, municipal officials must plan for the financing of defense costs regardless of whether they win or lose.

Delaware City has expended over $65,000 in successfully defending 1983 actions over the last five years. In one case, referred to above (Exhibit F), the city was awarded $9,000 in fees but has been unable to recover any amount from the plaintiff. Hamilton, New Jersey has expended $95,000 in the successful defense of two 1983 suits. The Township has not sought attorneys' fees on the advice of consulting counsel that the likelihood of success was minimal. (Exhibit P)

Daytona Beach, Florida expended $6,500 to defend a 1983 suit in which the city sought and was denied a motion for summary judgment and was subsequently granted a directed verdict at the close of the plaintiffs' case. (Exhibit G)

Stripped of all defenses, cities such as Fresno, California (Exhibit U-1), and Kearney, Nebraska (Exhibit N-1) report that they have settled Section 1983 suits in some instances because the cost of defense would have exceeded the nuisance value of the case. The City of Kalispell, Montana settled a suit claiming $1,900,000 for $8,500 rather than risk the payment of attorneys' fees to its insurance carrier which defended the case on a reservation of rights. (Exhibit U-2).

Moreover, were it not for the result in Owen, at least two cities indicated that they would have tried the cases and expected to prevail based on the good faith of the actors involved. Kearney, Nebraska settled a case for $2,500 because of the defense costs. The case arose out of the arrest by a city policy officer of the plaintiff under a warrant erroneously issued by the court for the wrong individual. (Exhibit N-1) Similarly, a suit against the City of Wilmington, Delaware alleging false arrest and claiming $400,000 in damages was settled for $4,000 including attorneys' fees by the city's insurance carrier despite the city's desire to go to trial. (Exhibit N-7)

Peoria, Illinois reported a case that has been pending against the city for eleven years by a prisoner, convicted of murder and armed robbery and serving a sentence of over 100 years. The suit alleges police brutality in the course of the plaintiff's arrest. The case has had an involved procedural history. After dismissal and appeal, a Chicago law firm was appointed counsel for the plaintiff. Despite the city's belief that the case is frivolous, the possibility of even an award of nominal damages against one of the defendants would subject the city to at least a five figure award of attorneys' fees. For this reason, the city may be forced to settle the suit. (Exhibit U-3)

The Borough of Pompton Lakes, New Jersey has included in its water rationing plan provision for the anticipated defense of 1983 suits against the borough by commercial and residential users who are affected by the plan. Despite the availability of water in excess of the borough's needs, as a result of past planning efforts, the borough is required to implement a water rationing plan due to a state-wide shortage. (Exhibit V)

2. The Effect on Future Actions of City Officials

Even more disturbing are the comments indicating that the anticipation of 1983 suits affects the actions of municipal officials. Wilmington, Delaware has observed that virtually every significant disciplinary action taken against city employees involving heavy penalty days, demotion or discharge results in either 1983 litigation or a Title VII charge. Even the city's success rate in both 1983 and Title VII cases has not kept the increased litigation from affecting the decision-making process. In one case, city officials indicated that the anticipation of a 1983 suit was a factor affecting the decision to impose a more lenient penalty than may have been warranted in an employee disciplinary proceeding involving a police officer who had admitted to taking as much as $3,500 in funds from the police evidence room and subsequently lying about his involvement. (Exhibit Q)

S.990 AND THE LIABILITY FOR MONETARY EXPENSE IN EQUITABLE ACTIONS

Actions challenging personnel actions of the city are typical of Section 1983 suits pending against municipalities. These cases also illustrate the unworkable nature of the distinction contained in S.990 between equitable actions and suits for damages or other monetary relief.

Four of the eight pending Section 1983 suits against the City of Wilmington, Delaware are of this type. Relief sought is usually reinstatement and "other equitable relief" such as backpay. The backpay claims can be significant where suit has not been immediately brought and discovery is lengthy. (Exhibit N-7)

City fire fighters brought a class action against the City of Longview, Texas challenging the adoption of a promotion policy based on training, education and length of service. Plaintiffs alleged deprivation of a property right in the prior, unwritten promotion policy, administered without any guidelines and based primarily on seniority. Plaintiffs sought an injunction against enforcement of the policy, damages, attorneys' fees and "other relief as may be proper." (Exhibit V-1)

Police officers sued the City of Lakewood, Colorado alleging discrimination based on race and national origin for failure to promote them. Each plaintiff sought a promotion, backpay and $464,000 in damages. (Exhibit V-2)

Other examples of suits seeking equitable relief which result in significant monetary liability are provided by Los Angeles County, California. Actions challenging the county jail system, and the administration of public welfare and health care programs are of this type. Because these programs involve large numbers of recipients, any order to provide greater benefits would greatly exceed the amounts sought as money damages. (Exhibit V-3)

Similarly, the City of Parma, Ohio identified a class action against the local municipal court, challenging the validity of service of process procedures in eviction proceedings, as one involving substantial monetary liability in the absense of absolute or qualified immunity. (Exhibit N-5)

The City of Daly City, California is a defendant in a class action alleging violation of the Housing and Community Development Act of 1974, violation of Title VIII of the Fair Housing Act of 1968 and violation of Title VI of the Civil Rights Act of 1964 arising out of the implementation of the City's housing assistance plan to provide rental housing for low and moderate income families. The complaint requests that the City be ordered to establish a plan, with goals and a timetable, for the steps it will take to encourage, assist or provide for construction of new low income family rental housing. (Exhibit V-4).

Conclusion

The facts reported to NIMLO clearly support amendment of 42 U.S.C. §1983 of the type provided by S.584 and S.585, and clearly support an amendment to the Fees Act, 42 U.S.C. §1988.

The cases reported to NIMLO reflect what we suggest is an accurate picture of the state of Section 1983 litigation against municipalities today. This picture is corroborated by Justice Powell's concurring opinion in *Parratt* v. *Taylor*, 49 U.S.L.W. 4509 (May 18, 1981), a suit by a prison inmate against state prison officials, regarding the abuse of Section 1983 by plaintiff litigants.

> "The present case, involving a $23 loss, illustrates the extent to which constitutional law has been trivalized (sic), and federal courts often have been converted into small-claims tribunals. There is little justification for making such a claim a federal case, requiring a decision by a district court, an appeal as a matter of right to a court of appeals, and potentially, consideration of a petition for certiorari in this Court. It is not in the interest of claimants or of society for disputes of this kind to be resolved by litigation that may take years, particularly in an over burdened federal system that never was designed to be utilized in this way." 49 U.S.L.W. 4509, 4516, n. 13.

Although the amendment to Section 1983 proposed in S. 585 will not directly deter the use of Section 1983 for the assertion of frivolous claims, the availability of a good faith defense is a step in the right direction and, in conjunction with amendment of Section 1988, will go far in protecting municipalities against frivolous claims. We join Justice Powell in urging the Congress to amend Section 1983 to "clarify its scope while preserving its historical function of protecting individual rights from unlawful state action." *Id.*

EXHIBIT A

QUESTIONNAIRE FOR TESTIMONY BY NIMLO MEMBERS BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE JUDICIARY COMMITTEE ON S. 584 AND S. 585 TO AMEND 42 U.S.C. SEC. 1983 ON MAY 6 AND 7, 1981.

1. Briefly describe the facts in any frivolous 1983 claims pending against the city; the amount of damages sought. Attach pleadings or motions you think will better inform the congressional readers of the hearings record. Explain the frustration of municipal defendants in getting frivolous claims dismissed.

2. List any unusually large attorney's fees awards in relation to the amount of damages awarded against the city.

3. Briefly describe any cases in which the city prevailed and sought attorney's fees which were denied.

4. List the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claimed

5. Indicate the kinds of cases nominally styled equitable or seeking injunctive relief which would result in monetary municipal liability without some sort of absolute, or qualified good faith, immunity in equitable/injunction cases.

EXHIBIT B

City of Norfolk, Virginia

DEPARTMENT OF LAW
900 CITY HALL BUILDING
NORFOLK, VIRGINIA 23501

PHILIP R. TRAPANI
City Attorney

S. W. McGANN, Jr.
Chief Deputy City Attorney

ROBERT F. BANKS
HAROLD P. JUREN
RALPH D. KATHERMAN
DANIEL R. HAGEMEISTER
Deputy City Attorneys

BENJAMIN V. BULL
ALAN M. SALSBURY
WILLIAM J. BRIDGE
PATRICK H. KNIGHT
MARY L. G. NEXSEN
MARTHA G. ROLLINS
Assistant City Attorneys

AREA CODE
804

PHONE
441-2871

April 24, 1981

NIMLO
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D. C. 20036

RE: Questionnaire regarding civil rights lawsuits against municipalities (§1983)

Gentlemen:

Enclosed please find the completed questionnaire regarding the above.

Sincerely,

Harold P. Juren

Harold P. Juren
Deputy City Attorney

HPJ:pbd

Enclosure

Norfolk, Virginia

QUESTIONNAIRE FOR TESTIMONY BY NIMLO MEMBERS BEFORE
THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE
JUDICIARY COMMITTEE ON S. 584 AND S. 585 TO AMEND
42 U.S.C. SEC. 1983 ON MAY 6 AND 7, 1981.

1. Briefly describe the facts in any frivolous 1983 claims pending against the city; the amount of damages sought. Attach pleadings or motions you think will better inform the congressional readers of the hearings record. Explain the frustration of municipal defendants in getting frivolous claims dismissed.

There have been many in the past, but the best example of a currently pending frivolous 1983 claim is Harris v. City of Norfolk, et al. Copies of the Complaint, the pending Motion to Dismiss, with supporting brief, are attached.

2. List any unusually large attorney's fees awards in relation to the amount of damages awarded against the city.

None.

3. Briefly describe any cases in which the city prevailed and sought attorney's fees which were denied.

None.

CITY OF NORFOLK

4. List the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claimed.

No significant figures available.

5. Indicate the kinds of cases nominally styled equitable or seeking injunctive relief which would result in monetary municipal liability without some sort of absolute, or qualified good faith, immunity in equitable/injunction cases.

?

THE CITY OF WICHITA

JOHN DEKKER, Director of Law and City Attorney

DEPARTMENT OF LAW
OFFICE OF CITY ATTORNEY
CITY HALL – THIRTEENTH FLOOR
455 NORTH MAIN STREET
WICHITA, KANSAS 67202
(316) 268-4681

EXHIBIT C

April 29, 1981

Mr. Charles S. Rhyne
General Counsel
National Institute of
  Municipal Law Officers
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

Dear Mr. Rhyne:

Enclosed please find the City of Wichita's response to the Bates Committee Memorandum and Questionnaire.

Very truly yours,

John

John Dekker
Director of Law

JD:GER:kh

RESPONSE OF THE CITY OF WICHITA, KANSAS
TO THE BATES COMMITTEE
MEMORANDUM AND QUESTIONNAIRE

1. Briefly describe the facts in any frivolous 1983 claims pending against the City; the amount of damages sought. Attach pleadings or motions you think will better inform the congressional readers of the hearings record. Explain the frustration of municipal defendants in getting frivolous claims dismissed.

a. Ben Martin, et al v. City of Wichita, et al, U.S. District Court of Kansas. Damages sought in excess of $6 million. This case may be characterized as a state court condemnation action elevated to the federal constitutional arena because of allegations of racial discrimination under the Civil Rights Act. The City attempted to assist a private corporation in developing a gasohol plant to further legitimate governmental needs as to energy, economic development and industrial development. The plaintiffs claim for themselves and a class of people a conspiracy on the part of all white persons in the City to intentionally locate the plant in a predominately black community, knowing it will be injurious to the health, safety, and welfare of black citizens. The attached complaint of the plaintiffs and the City's Motion for Summary Judgment (pending) clearly shows the absurdity of the lawsuit.

b. McClain v. City of Wichita, et al., U. S. District Court of Kansas. Damages sought are $1 million actual and $1 million punitive. Plaintiff attempted to try his hand at pretending to be a real estate developer, and builder. He twice sought to build low income housing in the City utilizing federal funds (known as §8 housing). Both proposals were recommended for disapproval by the City as they were inconsistent with the City Housing Assistance Plan. One proposal was rejected by HUD, the other was never formally submitted to HUD. Plaintiff claims the City acted discriminatorily in recommending rejection of his proposals, but HUD did not when it rejected them. He also claims discrimination for the City's failure to honor an option on Urban Renewal property. In actuality, the option was never executed. Further, HUD had twice previously rejected the use of the subject land for federally funded housing projects.

c. Rice v. City of Wichita, et al., U.S. District Court of Kansas. Damages sought are $750,000 actual and $1 million punitive. There are two consolidated employment discrimination cases involving the termination of the Executive Director of the City's Civil Rights Commission, and his earlier claim of a denial of a merit pay raise. The merit pay raise was denied by the City Manager because the plaintiff, an executive employee, called the Manager a "damn liar" in the local newspaper. The termination case involved the disruption of a meeting of the City's Civil Rights Board by the plaintiff, wherein he scuffled with one of the board members and then removed a tape recorder, used to prepare the board's meeting minutes, and himself from the meeting. In the ensuing investigation of the incident by the City Manager, the plaintiff refused to cooperate and refused access to the tape recording of the meeting, claiming it was his personal property. He was terminated for insubordination. Plaintiff sued the City, the City Manager, two Assistant City Attorneys and the white members of the Civil Rights Board, necessitating the retention of outside counsel to defend the matter. Attached is a copy of the Pretrial Order filed in the case.

d. Howell v. City of Wichita, et al. Damages sought are in excess of $10,000. This is a classic case of mistaken identity. Plaintiff was arrested by police officers based upon probable cause. However, it turned out that plaintiff's twin brother was the real culprit. Plaintiff was detained for two hours and then released when the identity question was resolved. The basis of plaintiff's claim is the two-hour inconvenience to him.

e. Rhodes v. City of Wichita, et al., U.S. District Court of Kansas. Damages sought in excess of $110,000. This suit was initially brought on the basis of race discrimination. It is now based upon Fourth Amendment violations. Police officers investigated a report of a break-in at an empty house. They found two black juveniles inside who refused to answer questions and became abusive to the officers. An altercation ensued and the two juveniles were arrested. The parents brought suit saying the officers had no right to be at the house, the youths were merely cleaning it for the parents, and the officers brutalized the youths. A copy of the defendants' pending Motion for Summary Judgment is attached.

f. In all of the above cases, discovery was accomplished quickly in order to establish a sufficient factual basis to attempt dismissal of the claims. However, the plaintiffs are granted excessive leeway to find some basis to support their claims. The law is so unsettled, particularly as to municipal entity liability, that federal courts are hesitant to grant dismissals even though it is acknowledged that the cases are lacking in merit. In the meantime, the cases are continued for inordinate periods of time; in some instances municipal projects are stalled and the City is required to expend large sums of money in defense of these matters. A prime example is the Martin case, no. 1.a.: after the defendants filed motions for summary judgment, plaintiffs requested a delay in their response thereto in order to file a motion for class certification and have it decided prior to the decision on the summary judgment motions.

2. List any unusually large attorney's fees awards in relation to the amount of damages awarded against the City.

At the present time, there have been no damage or attorney's fees awards against the City.

3. Briefly describe any cases in which the City prevailed and sought attorney's fees which were denied.

None at this time.

4. List the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claimed.

a. Police brutality case. Plaintiff originally claimed $600,000. Settled for $2,500 or .4% of the original claim.

5. Indicate the kinds of cases nominally styled equitable or seeking injunctive relief which would result in monetary municipal liability without some sort of absolute or qualified good faith, immunity in equitable/injunction cases.

a. The Martin case listed in 1.a. is an example of such a case, i.e., an attempt to enjoin a municipal urban renewal project based upon race discrimination.

EXHIBIT D

CITY OF KALAMAZOO, MICHIGAN

April 24, 1981

NIMLO
1000 Connecticut Avenue, N. W.
Suite 800
Washington, D.C. 20036

Re: Questionnaire Regarding Proposed Legislation to Amend
42 U.S.C. 1983

Gentlemen:

I am returning herewith the questionnaire which was solicited by you for purposes of assisting the subcommittee in hearings on proposed amendments to 42 U.S.C. 1983.

This office wishes you the best of luck in your efforts to assist the committee in this very crucial area of municipal liability.

Yours very truly,

Robert H. Cinabro
Deputy City Attorney

RHC:gjf

Encl.

Kalamazoo, Michigan

QUESTIONNAIRE FOR TESTIMONY BY NIMLO MEMBERS BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE JUDICIARY COMMITTEE ON S. 584 AND S. 585 TO AMEND 42 U.S.C. SEC. 1983 ON MAY 6 AND 7, 1981.

1. Briefly describe the facts in any frivolous 1983 claims pending against the city; the amount of damages sought. Attach pleadings or motions you think will better inform the congressional readers of the hearings record. Explain the frustration of municipal defendants in getting frivolous claims dismissed.

The City of Kalamazoo currently has pending against it a lawsuit in Federal District Court alleging a 1983 cause of action and asking for $1,500,000.00 in damages. This is as the result of the presence of two police officers inside a dwelling for approximately ten minutes during which time no one was injured and no property was taken. It will undoubtedly require a great deal of time and expense by this office to successfull defend this lawsuit.

2. List any unusually large attorney's fees awards in relation to the amount of damages awarded against the city.

3. Briefly describe any cases in which the city prevailed and sought attorney's fees which were denied.

4. List the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claim

A 1983 Federal District Court case was recently settled by the City of Kalamazoo's insurance carrier by the payment of $25,000. The suit originally claimed $1,200,000, so the settlement was approximately 2% of the amount originally claimed.

5. Indicate the kinds of cases nominally styled equitable or seeking injunctive relief which would result in monetary municipal liability without some sort of absolute, or qualified good faith, immunity in equitable/injunction cases.

A suit was recently filed against the City of Kalamazoo which contained a 1983 count an sought injunctive relief regarding tax assessments. It could have resulted in monetary municipal liability without some sort of good faith immunity available. All the evidence showed that all City officials acted in good faith. The suit also involve the good faith attempts to comply with Michigan's Open Meetings Act.

EXHIBIT E

QUESTIONNAIRE FOR TESTIMONY BY NIMLO MEMBERS BEFORE
THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE
JUDICIARY COMMITTEE ON S. 584 AND S. 585 TO AMEND
42 U.S.C. SEC. 1983 ON MAY 6 AND 7, 1981.

1. Briefly describe the facts in any frivolous 1983 claims pending against the city; the amount of damages sought. Attach pleadings or motions you think will better inform the congressional readers of the hearings record. Explain the frustration of municipal defendants in getting frivolous claims dismissed.

See attachment.

2. List any unusually large attorney's fees awards in relation to the amount of damages awarded against the city.

None

3. Briefly describe any cases in which the city prevailed and sought attorney's fees which were denied. James v. Bennett - This matter involved a civil rights action filed by members of the police department who were the subjects of a disciplinary action. The suit was filed against the City and its administrative officials and was dismissed for failure to prosecute. The City requested attorney's fees but was denied the same. The court commented, saying that attorney's fees are not recoverable by governmental agencies. Case No. 429.

4. List the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claimed

None

5. Indicate the kinds of cases nominally styled equitable or seeking injunctive relief which would result in monetary municipal liability without some sort of absolute, or qualified good faith, immunity in equitable/injunction cases.

N/A

In response to Section 1 of your questionnaire requesting information on frivolous 1983 claims, there is a matter presently pending in our office which is not only frivolous but simply ridiculous. The relevant facts are as follows:

On April 4, 1980, Animal Control Officers of the City of Aurora responded to a dog bite complaint. Upon arrival, they observed a red Cadillac in a state of incredible disrepair, filled with clothing, trash, debris, a large quantity of animal excrement and five dogs. In addition, it appeared that the Plaintiff in this matter, one Helen VanSchoonhoven, was using this automobile as her place of residence. The stench inside the vehicle was such that the officers were unable to enter or remain in the interior area of the car.

Due to the dog bite incident, the officers attempted to impound the animals under a Municipal Ordinance requiring confinement and observation for possible rabies infection. Based on the strenuous objections of the plaintiff, the Animal Control Officers requested assistance from the Aurora Police Department and a detective responded to the scene.

Based on the Plaintiff's living conditions, as previously described, and based on the incoherrent and often rambling speech of the plaintiff, the detective determined that a mental health evaluation was called for. The Plaintiff was evaluated on April 7, 1980 and released. A mental health professional from the Aurora Mental Health Center, then petitioned the District Court for an Order requesting the Plaintiff be confined for 72-hours for mental health evaluation and treatment. As a result, the Plaintiff was transported to Fort Logan Mental Health Center.

For the reasons enumerated in the attached Complaint, the Plaintiff has filed suit requesting one million six hundred thousand dollars in damages plus attorney's fees and costs.

As you will see from the photographs enclosed, the vehicle itself is not fit for habitation by animals much less human beings. In addition, Plaintiffs attorney, upon initial contact, stated that he felt the Plaintiff to be mentally unstable and in need of treatment. He has obviously changed his mind. There are individuals, too numerous to mention, who will testify concerning the mental condition of the Plaintiff and to the fact that she was and is a danger to herself and to others.

It is indeed frustrating, when confronted by suits such as this, to realize that an inordinate amount of time, effort and money must be expended simply to thwart spurious actions. As you well know, the courts are hesitant to dismiss any suit in the preliminary pleading stages and will normally deny Motions for Summary Judgment and Judgment on the pleadings to avoid the potential for reversal at the Appellate level. Further, should the municipality be successful in removing itself as a defendant, it more than likely will still be required to involve itself in the defense of its employees, and in addition, will be required to indemnify those employees for at least a portion of their damages.

Due to the "Deep Pocket" approach most attorneys take when filing suit, U.S.C. Sec. 1983 serves as an open invitation to the filing of frivolous claims. In many cases, the municipality is forced to settle these frivolous suits simply to avoid the increased workload resulting from a back-log of law suits, thus increasing the tendancy of private practitioners to file suits without merit and creating a vicious circle.

Finally, when a municipality is forced to defend spurious complaints it serves to detract from a City Attorney's ability to respond to actions which may in fact have some merit. This results in placing the City Attorney's Office in an untenable bargaining position which then may force the municipality into settling a case for an amount which is much greater than the award which may be justified by the merits of the action.

As you can see, the problem which you seek to rectify is one which has a direct and profound effect on our office. If you have any questions concerning the action which is the subject of this communication or on the City of Aurora's problems resulting from 1983 claims, please feel free to contact me. Should you wish me or one of the other Assistant City Attorneys in this office to testify before the subcommittee, we would be happy to do so.

Marc Colin
MARC COLIN

Charles Richardson
CHARLES RICHARDSON
1470 South Havana
Aurora, Colorado 80012
695-7030

EXHIBIT F

CITY OF DELAWARE CITY, DELAWARE

City Solicitor -
Stephen D.M. Robinson, Esquire
Robinson, McKelvie & Geddes
One Rodney Square
P.O. Box 1150
Wilmington, Delaware 19899

1. Briefly describe the facts in any frivolous 1983 claims against the city; the amount of damages sought. Attach pleadings or motions you think will better inform the congressional readers of the hearings record. Explain the frustration of municipal defendants in getting frivolous claims dismissed.

Current cases: Griffin v. Delaware City. Claim by Police Chief of wrongful dismissal from job based upon discrimination and race. Amount claimed: $500,000. Previous cases: Blake v. Delaware City. Wrongful towing of 13 junk automobiles. Amount claimed: $2,000,000. Disposition: After 6 day jury trial in Federal Court, the jury awarded plaintiff $1,500 in damages under a pendant State law claim. Defendants paid out over $45,000 in attorneys' fees to defend the case and were successful in obtaining a judgement against plaintiff for over $9,000 in attorneys' fees. However, plaintiff is judgement proof and there has been no recovery of those attorneys' fees. Tomlinson v. Delaware City. Wrongful dismissal of police officer. Amount claimed: $50,000. Case dismissed on summary judgement after briefing and oral argument. City expended over $6,000 in attorneys' fees to dismiss this case.

2. List any unusually large attorney's fees awards in relation to the amount of damages awarded against the city.

The City of Delaware City has been successful in defending all claims based on Section 1983. However, the cost of defending these actions in the aggregate over the last 5 years has exceeded $65,000.

3. Briefly describe any cases in which the city prevailed sought attorney's fees which were denied.

The City has prevailed in both the Blake case and Tomlinson case, cited above, and was successful in obtaining an award of attorneys' fees against plaintiff in the Blake case, which fees have not been recovered.

4. List the amount of Section 1983 judgements and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amount originally claimed.

Griffin case: pending

Blake case: $2,000,000 claimed; $1,500 jury award (pendant State law claim)

Tomlinson case: $50,000 claimed; dismissed.

EXHIBIT G

OFFICE OF THE
CITY ATTORNEY
THE CITY OF DAYTONA BEACH
SUITE 213, CITY HALL
POST OFFICE BOX 551
DAYTONA BEACH, FLORIDA 32015

TELEPHONE 904 258-3194

FRANK B. GUMMEY, III
CITY ATTORNEY

GREGORY J. MCDOLE
ROBERT G. BROWN
NANCYE R. CROUCH
ASSISTANT CITY ATTORNEYS

April 24, 1981

Mr. John Dekker, President
NIMLO
1000 Connecticut Ave., N.W.
Suite 800
Washington, D.C. 20036

Re: 42 U.S.C. §1983 - Frivolous Claims

Dear President Dekker:

I would like to report to you about a case filed against a city police officer and two state beverage agents, under Section 1983. The officer and beverage agents arrested a bartender for selling alcoholic beverages without a license. They also filled out affidavits for the State Attorney's Office (prosecutor) for use in prosecution of the owner, a local attorney. The owner was never criminally charged.

The owner and bartender brought the 1983 action in federal court, over sixty miles removed from Daytona Beach. After discovery, a motion for summary judgment was filed which was supported by sworn testimony clearly indicating that liquor was sold and that there was no license for the sale. No doubt because of the press of the court's business, the motion was denied.

At trial the evidence was again presented and it was obvious that the Judge recognized the sale was illegal as a matter of law. At the end of the plaintiff's two day case, including their opening statement requesting $800,000.00 in damages, the court granted a motion for a directed verdict.

No motion was filed for the $6,500.00 in attorneys' fees and costs incurred by the City and the unknown amount incurred by the State Beverage Department, as the court had informally indicated it would not rule favorably on such motions. It hardly seemed wise to aggravate a judge whom one might appear before in the future, or prepare an appeal to New Orleans when the amount could not justify extensive pursuance.

This case had no business being tried. However, it would be much more likely that the case would have been dismissed before trial in a state court, because of a local judge's judicial notice of local facts and people and more ample opportunity for motion practice and argument. The court's refusal of attorneys' fees in such baseless litigation shows Section 1988 to be a one-edged sword.

I hope this is of use to you in preparing for the Congressional hearings.

Very truly yours,

Frank B Gummey III

Frank B. Gummey, III
City Attorney

FBG/pc

cc: Claude L. Mullis, League Counsel
Florida League of Cities

EXHIBIT H

City of Sioux City

LEGAL DEPARTMENT
310 City Hall
Phone 712/279-6318

April 24, 1981

NIMLO
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

Re: Questionnaire for Testimony Before Senate Judiciary Committee on S.584 and S.585 (42 U.S.C. Sec. 1983)

Dear Sirs:

In response to your questionnaire asking for factual situations with regard to 1983 cases I am forwarding the following:

1. We have had two cases pending against the City of Sioux City, Iowa, which, in my opinion, were frivolous in nature. One case involved an action by an employee against a department head and the municipality as a result of that employee being disciplined for failing to answer questions presented to him by the department head concerning a complaint that had been lodged against the employee by a citizen. That employee filed a 1983 case in Federal Court and the case was ultimately dismissed by the Federal Judge upon a Motion for a Summary Judgment by the defendants. However, the Court was reluctant to dismiss it and is generally reluctant to dismiss such claims but would rather have a jury decide the issues. The case I believe was dismissed because the parties were able to agree as to the factual issues and there was no real factual issue in dispute. In cases where the plaintiff will claim that there are factual issues in dispute, the Federal Court would likely never dismiss such a claim.

   The other case involved a 1983 case against several employees and alleged that those employees acted outside the scope of their employment while they were enforcing a municipal ordinance. The facts in that case as evidenced by a rather complete discovery indicated that the employees did nothing more than enforce an existing City ordinance. However, the plaintiff claimed that the employees had conspired to violate the plaintiff's right to conduct a business and, in this case, the plaintiff was unwilling to stipulate as to the facts and urged that there was in fact a factual issue in dispute. This case was ultimately settled for a relatively nominal sum in comparison to the claim being made. There was an effort on

P.O. Box 447 • 6th and Douglas Streets • Sioux City, Iowa 51102

the part of the defendants to have the case dismissed upon a Motion for Summary Judgment, after all the discovery had been taken, but the Court would not dismiss the case, primarily for the reason that the plaintiff maintained that there were still factual issues in dispute that a jury ought to resolve.

2. We have not as yet experienced any award of attorney fees in a 1983 case.

3. To this date the City has not prevailed in any 1983 cases where the City has sought attorney fees.

4. Recently the City did settle a Section 1983 case for $14,000, the prayer being in the amount of approximately $260,000. The settlement therefore being approximately 5% of the prayer.

We hope this information will be useful to you.

Very truly yours,

Michael S. Walsh

Michael S. Walsh
City Attorney

kjp

EXHIBIT I

CITY OF STOCKTON
CITY HALL
STOCKTON, CA 95202

OFFICE OF THE CITY ATTORNEY
(209) 944-8333

April 28, 1981

NIMLO
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

RE: CIVIL RIGHTS LAWSUITS

During the past year, the City of Stockton, and its agents have defended three lawsuits brought under 42 U.S.C. Section 1983. A discussion of each suit is attached.

Of general interest is that local attorneys have not begun to use Section 1983, two of the three cases above having been pursued by attorneys from larger metropolitan areas, San Francisco and Sacramento. However, there are a number of claims presently being evaluated under the claims presentation statutes that expose the City of Stockton to the threat of Section 1983 suits if local attorneys chose that vehicle; i.e. alleged false arrest and police misconduct.

A basic frustration with the frivolous Section 1983 claim, is that the plaintiff's attorney, if he is knowledgeable, can and will prosecute his case in Federal Court. This not only by-passes the State claims filing requirements, it places an additional burden on the municipality of additional travel, lost time in travel, hiring a law firm in the City in which the Federal Court is located, etc. All of these factors give the plaintiff leverage in demanding settlement.

Without a good faith defense, a municipality is in constant danger of false arrest claims under Section 1983 every time the District Attorney accepts plea bargain, prosecutes a lesser offense or considers it necessary not to prosecute at all. An agricultural community such as Stockton may be particularly vulnerable to Section 1983 suits because of the large diverse minority groups employed, often on a seasonal basis.

Needless to say, we support your efforts and those of Senator Hatch and the Bates Committee.

Please advise if this office can provide any further assistance.

GERALD A. SPERRY
CITY ATTORNEY

Ronald J. D'Aiuto
RONALD J. D'AIUTO
DEPUTY CITY ATTORNEY

RJD:jg

Attachment

Stockton, California

QUESTIONNAIRE FOR TESTIMONY BY NIMLO MEMBERS BEFORE
THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE
JUDICIARY COMMITTEE ON S. 584 AND S. 585 TO AMEND
42 U.S.C. SEC. 1983 ON MAY 6 AND 7, 1981.

1. Briefly describe the facts in any frivolous 1983 claims pending against the city; the amount of damages sought. Attach pleadings or motions you think will better inform the congressional readers of the hearings record. Explain the frustration of municipal defendants in getting frivolous claims dismissed.

SEE ATTACHED LETTER

2. List any unusually large attorney's fees awards in relation to the amount of damages awarded against the city.

NONE

3. Briefly describe any cases in which the city prevailed and sought attorney's fees which were denied.

NONE

4. List the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claim

$0

5. Indicate the kinds of cases nominally styled equitable or seeking injunctive relief which would result in monetary municipal liability without some sort of absolute, or qualified good faith, immunity in equitable/injunction cases. *See Exhibit D. City is presently under threat of civil rights action. If Plaintiff were to have prevailed with injunction, City would have seen liable for damages to builder. If Plaintiff were to prevail on negligence/fraud, City would be directly liable for damages.

April, 1981

42 U. S. C. Section 1983 Litigation

CRUM vs. CITY OF STOCKTON, et al.

Facts: Plaintiff ordered steak and eggs in a restaurant and refused to pay after eating about half the steak, the eggs, toast and coffee. He complained he was given the wrong type steak. The innkeeper called police and signed citizen's arrest form. Innkeeper failed to keep appointment and sign formal complaint for DA and plaintiff was released.

Plaintiff brought suit against City alleging false arrest even though Penal Code immunized City and agents from false arrest claim based on citizen's arrest. City summary judgment granted.

Plaintiff conceded he had no cause of action based on false arrest, but he filed amended complaint again alleging false arrest and adding negligence in that officers failed to preserve evidence (half eaten steak) which plaintiff contended would have proven civil liability of innkeeper in separate cause of action filed against that party. City demurrer sustained based on res judicata (false arrest) and no cause of action existed (preservation of evidence for civil liability between parties).

Plaintiff appealled on both counts against the City. The Court of Appeal, in a published opinion affirmed judgment. The Appellate Court noted plaintiff's concession that he had no cause of action against City based on false arrest and rejected contention law enforcement personnel had a duty to anticipate civil litigation and preserve evidence such as in this case.

As regards potential civil rights violations, the Court stated:

> There is no merit in the contention that the court abused its discretion by sustaining the demurrer without leave to amend; the claim is made that plaintiff could have amended his complaint to state a cause of action for violation of his civil rights. The Civil Rights Act (42 U.S.C. §1981 et seq.) provides liability only where there has been a deprivation of a federally protected right. (Taylor v. Mitzel (1978) 82 Cal. App. 3d 665, 674 [147 Cal. Rptr. 323]). There is nothing in the facts involved here to suggest in any way the potential existence of a civil rights cause of action against City; the court properly refused to allow further amendment. (Routh v. Quinn (1942) 20 Cal. 2d 488, 493-494 [127 P. 2d 1, 149 A.L.R. 215]).
>
> Crum v. City of Stockton, 96 Cal. App. 3d 519, 522 (1979).

On January 31, 1980, Plaintiff filed his next Complaint in which he alleged violation of 42 U.S.C. Section 1983 in the Superior Court of California, County of San Joaquin again alleging false arrest, failure to preserve evidence, in addition to the deprivation of constitutional rights by "policy or custom of the CITY OF STOCKTON and the STOCKTON POLICE DEPARTMENT". [Emphasis in complaint].

The City's motion for judgment on the pleadings was granted after about 45 minutes of argument in Superior Court. This exceptionally frivolous example of Section 1983 litigation allowed a plaintiff to keep the City in Court from November 23, 1977 until September 3, 1980.

BILBAENO v. CITY

Facts: Plaintiff and friends were observed by City police officers, who considered them to be drunk in public. The parties were taken into protective custody under California Penal Code Section 647(ff) and taken to County Jail where they were to be held for a period. In County Jail, the parties were searched and held for a short period.

Plaintiff's attorney (from the Bay Area) prepared a confusing complaint alleging violation of Civil Rights in City Jail (it was County) by City Police officers (they were Deputy Sheriffs) as well as false arrest. Plaintiff contended he was discriminated against because he was "of Philipino descent".

Dismissal was obtained after two court appearances and related pleadings.

CLAIBORN v. CITY - Pending in U.S.D.C. (E.D. CA).

The facts in this case are best presented in the attached pleadings and police report. (EXHIBITS A, B, and C) Not provided are extensive investigative reports relative to this plaintiff's activities which are to be used at trial.

Plaintiff's attorney is alleged to be a renown civil rights attorney and this case may be a trendsetter should he prevail herein.

CITY OF STOCKTON
CITY HALL
STOCKTON, CA 95202

OFFICE OF THE CITY ATTORNEY
(209) 944-8333

November 5, 1980

Carlyn F. Galway, Esq.
Senior Staff Attorney
League of California Cities
1108 "O" Street
Sacramento CA 95814

POSSIBLE AMICUS CURIE BRIEF

Dear Ms. Galway:

Pursuant to our phone conversation of November 3, 1980, the following synopsis of dates, events and issues is presented for consideration by the Executive Committee.

March, 1977	Original application received by City of Stockton for development of Joaquin Murietta Estates.
March, 1977	City staff completed and forwarded to the State preliminary environmental assessment.
May, 1977	Negative Declaration issued and tentative map approved.
August, 1979	Subdivision agreement executed.
October, 1979	Construction of improvements began.
November 5, 1979	Bones of native Americans discovered on site; local Indian groups contacted, and a representative was appointed to supervise reinterment of bones on site.
December, 1979 through June, 1980	Political and ideological in-fighting among Indian factions occurred, and suit filed in June, 1980, by one individual (Arthur D. Pheland aka Wana the Bear).

The primary thrust of Pheland's suit was based on the theory that the burial ground constituted a "cemetery" within the meaning of California Health and Safety Code statutes. As such, it was subject to all legal protection regularly afforded "cemeteries". Pheland brought suit for injunctive relief to prevent further construction, naming both the City of Stockton and Community Construction, Inc., of Bakersfield, California as defendants.

Pheland and his attorney, Lawrence E. Drivon, cited Health and Safety Code Section 7003 which defines cemetery as a place used for interment, and Health and Safety Code Section 8100 which says that a cemetery is a place where six or more human bodies are buried. Plaintiff also cited Health and Safety Code Section 7052 which makes it a felony for any person to mutiliate or disinter human remains without authority.

Both the City of Stockton and Community Construction demurred to the complaint, alleging that the burial ground did not fall within the definition of "cemetery" found in Section 8100 of the Health and Safety Code because it was not "dedicated", as required by law.

Demurrer was sustained by Judge Darrah on July 21, 1980, with leave to amend. An amended pleading was filed August 20, 1980, realleging the same cause of action but also basing the complaint on theories of public trust, and nuisance.

Prior to the hearing on demurrer, Plaintiff Wana the Bear dismissed the City of Stockton as a defendant, but indicated that regardless of the outcome on the demurrer, the City could expect a lawsuit for negligence/fraud in the subdivision approval process at some future date.

The amended complaint was also vulnerable to demurrer, and it is that action which is now before the Third District Court of Appeal. Notice of Appeal was filed with the San Joaquin Superior Court on October 2, 1980, by Pheland.

As I indicated in our phone conversation, I believe that an Amicus Brief is proper in this matter because the case has significant potential impact on many cities and counties.

An affirmative ruling would constitute all native American burial sites as "cemetery" and would preclude development of any nature, subject local government entities to civil liabilities, and wreak havoc on rational long-range planning.

If further information is desired, or if I can be of any further assistance, please feel free to contact me.

Very truly yours,

BOB W. McNATT
DEPUTY CITY ATTORNEY

BWM:jb

EXHIBIT J

COMMONWEALTH OF VIRGINIA

COUNTY OF LOUDOUN

OFFICE OF COUNTY ATTORNEY
18 NORTH KING STREET
LEESBURG, VIRGINIA 22075

EDWARD J. FINNEGAN
COUNTY ATTORNEY

DANIEL J. TRAVOSTINO
ASSISTANT COUNTY ATTORNEY

NANCY W. KANE
ASSISTANT COUNTY ATTORNEY

TELEPHONE 777-0307

April 24, 1981

John Dekker
Director of Law
NIMLO
1000 Connecticut Ave., N.W.
Suite 800
Washington, DC 20036

Re: 42 U.S.C. §1983 Questionnaire

Dear Mr. Dekker:

In response to your letter of April 20, 1981 I would like to share with you a case which has recently been filed against the County of Loudoun, the County Administrator, the Fire Marshal and the eight members of the Board of Supervisors. The name of the case is Saitta v. County of Loudoun, Virginia, et al. It has been filed in the United States District Court for the Eastern District of Virginia (Alexandria Division) and is identified as Civil Action No. 81-0336-A. Jurisdiction is alleged under 42 U.S.C. §1983.

This suit contains five counts, 157 numbered allegations and seeks compensatory damages in the amount of $355,800 and punitive damages in the amount of $350,000 in each count, as well as costs and attorney's fees. The first count is the §1983 count, deprivation of civil rights under federal law, the other four counts involve violation of state law, local law, conspiracy and tortious interference with a contractual right. The complaint is 38 pages long, the exhibits total another 90 pages.

In a nutshell the facts are as follows. The plaintiff was discharged for insubordination. No pre-termination notice or hearing was given (the County personnel policy specifically stated that an employee was subject to immediate discharge for acts of insubordination). Plaintiff filed a grievance under the duly adopted state approved grievance procedure. During the processing of the grievance plaintiff requested immediate reinstatement from the Board of Supervisors. The Board denied the request and directed the plaintiff to follow the grievance procedures. A grievance panel determined that the plaintiff's actions warranted disciplinary measures however, the panel stated that a three month suspension without pay was the more appropriate disciplinary measure. The panel also made certain recommendations with regard to how the County could best manage its business. (These recommendations were clearly beyond the scope of the panel's authority.) Plaintiff was subsequently reinstated, stayed with the County approximately three months and then resigned. This suit was then filed. The plaintiff alleges that he has a constitutional right to a pre-termination hearing; that the grievance procedures do not contain all the statutory safeguards appellant thinks are necessary; that the parties conspired with other individuals initially to fire plaintiff and subsequently to force plaintiff to resign without specifying the facts upon which these allegations could be based; and other generally nasty things.

A responsive pleading has not been filed at this time. The County is currently considering filing a Rule 12(b)(6) motion as well as an answer.

For the purposes of your questionnaire, I do not believe that it would be appropriate for me to comment on this case as being "frivolous" - I will leave that to the judge. However, I think it would be most beneficial to point out at the Congressional Committee Hearing the huge amount of time and expense necessary in order to respond to 158 allegations and 130 pages of pleadings for eleven separate defendants within a twenty day period.

If someone on the NIMLO staff would desire to talk with me about this case, I would be more than happy to accomodate the individual. I would send a copy of the pleadings now, however considering the budget crunch which all local governing bodies are experiencing and the cost of first class postage I will wait to hear from NIMLO staff. I agree with you that it is most important that amendments to the Civil Rights Act of 1871 are necessary in order to protect state and local governments.

If I can be of assistance, please call.

Sincerely yours,

Edward J. Finnegan
County Attorney

EJF/sm

EXHIBIT K

THE CITY OF FAYETTEVILLE
NORTH CAROLINA
CHARTERED 1762

OFFICE OF THE
CITY ATTORNEY

P. O. BOX 1513
234 GREEN STREET
(919) 483-1762

FAYETTEVILLE, N. C. 28302

April 24, 1981

Mr. John Dekker
President, NIMLO
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

Re: Questionnaire for Testimony by NIMLO Members Before the Subcommittee on the Constitution of the Senate Judiciary Committee on S. 584 and S. 585 to Amend 42 U.S.C. §1983 on May 6 and 7, 1981

Dear Mr. Dekker:

In response to Question #1, in the last two months two claims have been filed against the City of Fayetteville. Both cases are essentially identical in nature of the relief sought. In one case, the plaintiff is asking for $27,000,000 in compensatory damages and $3,000,000 in punitive damages. The other case involves actually two separate complaints but both are based upon the same cause of action. In each case, the damages claimed are $93,000 or a total of $186,000. Both plaintiffs in each situation are state court prisoners whose convictions have been upheld on appeal in the state courts. The constitutional claims they are making in their complaints are the same ones raised in the state appellate courts. I feel confident that the recent Supreme Court decision in Allen v. McCurry will be dispositive of the issues. Additionally, in one of the cases the plaintiff is making a veiled claim for wrongful conversion of some money found in his possession when he was arrested that was not taken in a robbery. He was successful in getting this money back through a motion for appropriate relief after his state court conviction. I would definitely consider each of these cases a frivolous claim.

The City of Fayetteville has been somewhat fortunate in the §1983 cases and therefore I really have no responses to the remaining questions on the questionnaire. However, since

1976, the City of Fayetteville, its Chief of Police, and several police officers have had §1983 lawsuits filed against them totalling in excess of $46,000,000. With one exception, all of these claims have been dismissed either pursuant to Rule 12 or upon summary judgment. The one exception was a case where an innocent bystander was shot in the ear and it was settled for $5,000. These two totals do not reflect the two cases mentioned in the first paragraph that are currently pending.

With best regards, I remain

Robert C. Cogswell

Robert C. Cogswell, Jr.
City Attorney

pft

EXHIBIT L

WILLIAM CAMIL, INC.
ATTORNEY AT LAW
2460 HUNTINGTON DRIVE
POST OFFICE BOX 8743
SAN MARINO, CALIFORNIA 91108
(213) 285-9711

April 27,1981

NIMLO
1000 Connecticut Ave.,N. W., Ste. 800
Washington, D. C. 20036

SUBJECT: Memorandum to all NIMLO members requesting factual information regarding civil rights lawsuits against municipalities for presentation at Congressional hearings on proposed legislation to amend 42 U.S.C. Paragraph 1983 on May 6 and 7, 1981

Gentlemen:

This is in reply to your memorandum of April 20, 1981, on the above subject. The City of Duarte has one case filed against it pursuant to Section 1983. The case is still in the pleading stages and a copy of the Complaint is enclosed.

The case is completely frivolous. The City, after meticulously giving all notices required by any concept of due process and receiving no reply, participation or cooperation from the property owners, proceeded to demolish a deteriorated building, of nominal value, which was in violation of the Building Code and of several laws relating to the public health and safety. This lawsuit followed.

Very truly yours,

Wm. Camil

WILLIAM CAMIL
City Attorney
City of Duarte

WC:ws

EXHIBIT M

THE CITY OF PADUCAH
P.O. BOX 2267
PADUCAH, KENTUCKY 42001

April 28, 1981

National Institute of Law Officers
1000 Connecticut Avenue N.W. Suite 800
Washington, D. C. 200036

Gentlemen:

In response to your questionnaire attached to your letter of April 20, 1981, the City of Paducah is presently involved in one civil rights case which has a unique procedural history.

On November 6, 1969, the plaintiff filed a "complaint" per se in the United States District Court for the Western District of Kentucky. The plaintiff listed a number of wild acquisitions and finally asked for damages in the amount of $4,000,000.00, plus alleged property loss of $169,869.00, plus medical compensation in the sum of $1,500.00, plus punitive damages in the amount of $5,000.00.

The plaintiff named the City of Paducah, the Housing Authority of the City of Paducah, the City Police of the City of Paducah, the Sheriff's Department and a personal attorney as defendants, and each of the defendants filed a motion to dismiss. On January 1, 1980, the district judge dismissed the complaint against all defendants.

On January 11, 1980, the plaintiff filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit.

On February 13, 1980, the plaintiff had a certified record on appeal filed and took no further action accept for an extension of time to secure counsel.

On June 24, 1980, the Sixth Circuit, on its own motion, dismissed the appeal for "being frivolous and entirely without merit pursuant to Rule 9(d)2, Rules of the Sixth Circuit.

Mr. Yates responded by writing a long motion alleging all the discriminations that had happened to him. The Sixth Circuit then reinstated the appeal and appointed an attorney to represent the plaintiff from that point forward.

National Institute of Law Officers
April 28, 1981
Page Two

The case has now been briefed and is awaiting oral argument before the Sixth Circuit.

A copy of the complaint and motion to reinstate the appeal are enclosed.

I trust this information will be of some assistance to you in your securing information for the presentation to the Senate subcommittee.

Very truly yours,

James W Utter

James W. Utter
Corporation Counsel

lm

cc: Hon. Carroll Hubbard

Enclosures

EXHIBIT N

CITY OF GOLDEN
911 TENTH STREET
GOLDEN, COLORADO 80401
PHONE 279-3331

Office of
CITY ATTORNEY

April 27, 1981

National Institute of Municipal Law Officers
1000 Connecticut Avenue, N.W., Suite 800
Washington, D.C. 20036

RE: Response to Section 1983 Questionnaire
of April 20, 1981

Gentlemen:

Rather than respond in the format of the questionnaire I wanted to bring to NIMLO's attention two circumstances that caused suits of a rather frivolous nature to be brought against the City of Golden essentially due to the attorney's fee award act, Section 1988, as follows:

1. Jack Hagel and Jean Jonet (on behalf of the Unification Church) vs. City of Golden, Colorado Civil Action 78-F-1299, United States District Court, District of Colorado. This 1983 action was brought against the City of Golden challenging the application of our solicitation ordinance against the solicitors of the Unification Church. A number of other communities, including Northglenn, Sterling, and Montrose were also simultaneously sued in other actions in United States District Court. The City of Golden rather rapidly proceeded to a stipulated conclusion with the Unification Church which did allow their members to solicit door to door in our community, although certain identification and registration requirements are required. In this stipulation plaintiffs' counsel agreed that any award of attorney's fees would be bifurcated in a separate hearing and this was submitted to Judge Finesilver for entry. Incredibly, Judge Finesilver refused the stipulation and would not allow bifurcation of the attorney's fees issue. At this point the City was placed in the untenable position of having to litigate the entire case, even though there was a satisfactory stipulation, over the question of attorney's fees, and in the process subjecting ourselves to a considerable liability for attorney's fees in the event we did not prevail in the litigation. As a result, The City of Golden was forced to pay plaintiffs's counsel $1,000 in attorney's fees even though we were essentially the prevailing party in the action.

2. Association of Community Organization for Reform Now (ACORN), vs. the City of Golden and the Golden Police Department, Civil Action No. 80-M-1753, United States District Court, District of Colorado. This is a pending 1983 action challenging our solicitation ordinance as applies to the plaintiffs which are a politicially active non-profit though not tax exempt organization. Our first reaction to the complaint was that there had been a mistake since there had been no effort by the plaintiffs to obtain the usual exemption to our solicitation ordinance. Upon my initial contact

National Institute of Municipal Law Officers
April 27, 1981
Page Two

with plaintiffs' counsel and my explanation that in all likelihood that their organization would receive the necessary exemption if they merely filled out the exemption form, I received back the letter that I have appended hereto, demanding $4,000 in attorney's fees to resolve the issue. It appeared that the only work that plaintiffs' counsel had done in the case at this time was to file an approximate five page complaint in the United States District Court. No good faith attempt in my opinion had ever been made by plaintiffs' counsel to resolve this issue outside of the court process.

It is my opinion that the attorney's fee award act, Section 1988, is the sole reason that the above mentioned cases were brought against the City of Golden, by essentially young attorneys that in my opinion were using the act to obtain experience in Federal Court.

Thank you for your cooperation and good luck in this worthy endeavor.

Sincerely yours,

Russell J. Sindt
City Attorney

RJS:gw

Enclosure

EXHIBIT N-1

City of Kearney, Nebraska

QUESTIONNAIRE FOR TESTIMONY BY NIMLO MEMBERS BEFORE
THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE
JUDICIARY COMMITTEE ON S. 584 AND S. 585 TO AMEND
42 U.S.C. SEC. 1983 ON MAY 6 AND 7, 1981.

1. Briefly describe the facts in any frivolous 1983 claims pending against the city; the amount of damages sought. Attach pleadings or motions you think will better inform the congressional readers of the hearings record. Explain the frustration of municipal defendants in getting frivolous claims dismissed.

The City Council declared an unsightly, unsafe, delapidated uninhabited residential dwelling a nuisance. Plaintiff sued the City for $150,000.00 damages for deprivation of property, etc. and asked $500,000.00 punitive, based upon his loss of reputation and inability to sell the property. Pleadings attached which explain the case. The District Court Judge, one of the best in the state, has very little experience with this type of claim and it therefore having some difficulty with it.

2. List any unusually large attorney's fees awards in relation to the amount of damages awarded against the city.

None awarded as of this date.

3. Briefly describe any cases in which the city prevailed and sought attorney's fees which were denied.

None.

4. List the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claimed.

Attorneys for insurance carrier recently settled a case against one of the City's officers individually for the sum of $2,500.00 because it was less expensive than affording a defense. The officer correctly served the valid warrant upon the properly identified defendant and had a complete defense of immunity. See Quast v. City of Ontario, 603 P 2d 1210, the warrant had been erroneously issued by the Court for the wrong individual.

5. Indicate the kinds of cases nominally styled equitable or seeking injunctive relief which would result in monetary municipal liability without some sort of absolute, or qualified good faith, immunity in equitable/injunction cases.

In this state, too many to list. See No. 1 above as example.

EXHIBIT N-2

City of Corvallis, Oregon

QUESTIONNAIRE FOR TESTIMONY BY NIMLO MEMBERS BEFORE
THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE
JUDICIARY COMMITTEE ON S. 584 AND S. 585 TO AMEND
42 U.S.C. SEC. 1983 ON MAY 6 AND 7, 1981.

1. Briefly describe the facts in any frivolous 1983 claims pending against the city; the amount of damages sought. Attach pleadings or motions you think will better inform the congressional readers of the hearings record. Explain the frustration of municipal defendants in getting frivolous claims dismissed. Emerick v. Officer Torres, et al. Plaintiff's car was towed because it was in violation of city ordinance. Plaintiff is asking for $40,000 punitive damages and other damages to be determined by the court because he believes his car was towed illegally. Defense of the matter refused by city's insurance carriers. Copy of complaint attached.

2. List any unusually large attorney's fees awards in relation to the amount of damages awarded against the city.

3. Briefly describe any cases in which the city prevailed and sought attorney's fees which were denied.

4. List the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claimed.

5. Indicate the kinds of cases nominally styled equitable or seeking injunctive relief which would result in monetary municipal liability without some sort of absolute, or qualified good faith, immunity in equitable/injunction cases.

For additional information, please contact Richard D. Rodeman, Deputy City Attorney, Post Office Box 1083, Corvallis, Oregon 97330, (503) 757-6906.

EXHIBIT N-3

San Leandro, California

QUESTIONNAIRE FOR TESTIMONY BY NIMLO MEMBERS BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE JUDICIARY COMMITTEE ON S. 584 AND S. 585 TO AMEND 42 U.S.C. SEC. 1983 ON MAY 6 AND 7, 1981.

1. Briefly describe the facts in any frivolous 1983 claims pending against the city; the amount of damages sought. Attach pleadings or motions you think will better inform the congressional readers of the hearings record. Explain the frustration of municipal defendants in getting frivolous claims dismissed.

See Attached

2. List any unusually large attorney's fees awards in relation to the amount of damages awarded against the city.

None at this time.

3. Briefly describe any cases in which the city prevailed and sought attorney's fees which were denied.

None at this time.

4. List the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claimed.

None at this time.

5. Indicate the kinds of cases nominally styled equitable or seeking injunctive relief which would result in monetary municipal liability without some sort of absolute, or qualified good faith, immunity in equitable/injunction cases.

None at this time.

NIMLO QUESTIONNAIRE

Answer 1.

1. A. John Melis v. City of San Leandro, et al

FACTS: Complaint by former CETA Administrative employee who was laid off when City ended its direct management of the federal jobs program.

Plaintiff contends he was fired because the City refused to correct alleged violations in CETA, allegedly raised by Plaintiff.

This male caucasion claims he was discriminated against, harassed, denied promotional opportunities and conspired against by the City, by: (1) falsely informing prospective employers that Plaintiff was a troublemaker; and (2) publicly humiliating and embarrassing Plaintiff by relocating his desk to a small and confined space, isolated from his co-workers.

DAMAGES: According to proof.

B. John Malson v. City of San Leandro, et al

FACTS: A neighboring City, pursuant to a valid search warrant allowing the search of certain premises in the neighboring City. The search warrant was supported by an affidavit signed by a San Leandro police officer. No San Leandro officer actively participated in the subsequent raid and detention.

The officers, while attempting to capture a suspect, followed the suspect from the premises subject to the search warrant, into the adjoining duplex unit, which was Plaintiff's place of residence. It appears the officers acted in good faith.

Plaintiff brought suit for deprivation of rights, privileges and immunities secured to them by the Constitution of the United States in that the search constitued an arbitrary intrusion by defendants and deprived Plaintiff of life, liberty and property without due process of law.

DAMAGES: According to proof.

C. Zazueta v. City of San Leandro

FACTS: Plaintiff was arrested in the men's room of the Macy's Department Store in San Leandro. The arrest was made by officers working undercover in response to a complaint that the restroom had been the scene of homosexual solicitation. One officer observed Plaintiff occupying a stall for approximately 15 minutes. The officer went into the adjoining stall and sat down. He observed Plaintiff bending down and looking under the stall wall. Plaintiff then began various movements of his foot which the officer matched. Plaintiff then drew his feet back, got down and looked under the stall wall into the adjoining stall.

Plaintiff sued for deprivation of his civil rights.

DAMAGES: $100,000 general damages; $100,000 special damages.

Kansas City, Kansas

EXHIBIT N-4

ANSWERS TO QUESTIONNAIRE FOR TESTIMONY BY NIMLO MEMBERS BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE JUDICIARY COMMITTEE ON S. 584 and S. 585 TO AMEND 42 U.S.C. SEC. 1983 ON MAY 6 and 7, 1981.

1. Wright vs. City: Plaintiff alleges vicious beating by police. Facts: Plaintiff has filed numerous false claims against the City arising out of his employment, such as an allegation that he was terminated when he was transferred from CETA program to regular employment. Plaintiff is now stating he was viciously beaten by police, but in fact he provoked confrontation, hit and kicked policemen, and was finally hit once by a policeman to control him. Because the police did strike him, even though only once after his attach on them, this frivolous claim cannot be dismissed but must be heard on the merits. Plaintiffs seeks $1.1 million, $100,000 in actual damages and $1 million in punitive.

Calloway vs. City: Plaintiff, a black man, was fired after insubordinantion to his immediate supervisor, a black man. He admits the insubordination. He alleges discrimination based on race, even though the termination recommendation was made by a black man, the court has required submission of facts and evidence in connection with a motion for summary judgment by the City. At least 200 hours have been expended on this frivolous claim. Plaintiff seeks remedies under both Title VII and §1983, back pay, reinstatement, and $50,000 punitive damages.

Clark vs. City: Plaintiff, then a minor, was a passenger in his brother's car; his brother was stopped for speeding and routinely would have been issued a citation and sent on his way. Plaintiff who had been drinking, began an altercation with the officers, urged on by his girlfriend who was also drunk, and the officers ended by taking the young man to jail to release him to his mother. While in jail, he injured one officer by slamming his hand against the jail bars. At all times, the officers avoided using any physical force against him, and he sustained no injuries. He seeks $100,000 in actual damages and $100,000 in punitive. Although the juvenile court adjudged him a miscreant and found him guilty of disorderly conduct, justifying his detention, and although he was not physically mistreated, the case cannot be summary dismissed as frivolous.

These cases represent the sorts of frivolous claims which are frequently filed. In the case where some force was used in response to conduct by a person being arrested, and such force was reasonable under the circumstances, the plaintiff will frequently exaggerate the force used and the injuries he sustained, lying about the incident. In the case where employee has been fired, the plaintiff will make every attempt to make a § 1983 claim out of the incident to get into federal court and to be eligible for money damages. Finally, in the case where a person has been arrested or detained on probable cause, particularly where he has also been convicted, he will make up a story about police brutality to get back at the officers and the system that has convicted him. All these cases require investigation, court appearances and documents, preparation of motions to dismiss and summary judgment and briefs and oral argument in support thereof. In other words, at least one attorney and one secretary, and frequently investigative personnel, must spend a great deal of time just to prepare the evidence to place before the court that the claim is frivolous. Frivolous claims can almost never be dismissed before this work is completed, since the courts are required by law to give the plaintiff the benefit of every doubt.

2. None.

3. None.

4. Judgment of $1, $2400 attorney's fees; $50,000 claimed.
   Settlement of $3500; $20,000 claimed.
   Settlement of $1000; amount in excess of $10,000 claimed.
   Settlement of $4000; amount in excess of $10,000 claimed.

5. Question unclear.

Yours very truly,

/s/ Kathryn Pruessner Peters

Kathryn Pruessner Peters
Assistant City Attorney
City of Kansas City, Kansas

KPP/eb

EXHIBIT N-5

CITY OF PARMA OHIO

LAW DEPARTMENT

6611 RIDGE ROAD
886-2323
PARMA, OHIO 44129

ANDREW BOYKO
Law Director

CIVIL DIVISION
STEPHEN P. BOND
Assistant Law Director
THOMAS J. ITALIANO
Assistant Law Director
ROBERT F. SCHIFKO
Assistant Law Director

CRIMINAL DIVISION
JOSEPH F. CIASTON
Chief Assistant Prosecutor
RAY KOSCIANSKI
Assistant Prosecutor

April 30, 1981

John Dekker, President
NIMLO
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

Re: S. 584 and S. 585

Dear Mr. Dekker:

Pursuant to your memorandum dated April 20, 1981, enclosed please find the questionnaire response of the City of Parma, Ohio.

Very truly yours,

Andrew Boyko

Andrew Boyko
Law Director

AB/gw
Enclosures

Parma, Ohio

QUESTIONNAIRE FOR TESTIMONY BY NIMLO MEMBERS BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE JUDICIARY COMMITTEE ON S. 584 AND S. 585 TO AMEND 42 U.S.C. SEC. 1983 ON MAY 6 AND 7, 1981.

1. Briefly describe the facts in any frivolous 1983 claims pending against the city; the amount of damages sought. Attach pleadings or motions you think will better inform the congressional readers of the hearings record. Explain the frustration of municipal defendants in getting frivolous claims dismissed. **- no frivoulous claims currently pending.**

1-Action evolved from controversy between neighbors as to surface water drainage; and City was joined on the theory that it should have solved the problem. Similar issues had previously been litigated in state court, resulting in dismissal of City from that case. Nevertheless, City was joined in the second case. In this case, from the post - Monell, pre - Owen period, the Court refused to afford the City any immunity. Case was dismissed on the basis of a poorly-written complaint;(over

2. List any unusually large attorney's fees awards in relation to the amount of damages awarded against the city.

None to date.

3. Briefly describe any cases in which the city prevailed and sought attorney's fees which were denied.

None to date.

4. List the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claimed.

1981 (Vittardi case) - $600,000 demanded - $1,600 settlement plus outside counsel defense fees - .2%

1977 (Ponyicki case) - $5,000,000 demanded - $2,000 settlement - .04%

5. Indicate the kinds of cases nominally styled equitable or seeking injunctive relief which would result in monetary municipal liability without some sort of absolute, or qualified good faith, immunity in equitable/injunction cases.

1-class action against local municipal court, challenging validity of service of process procedures in eviction cases.
2-controversy between neighboring landowners over surface water drainage, demanding that City be enjoined from permitting circumstances.
3-phone company underground cable locked landowner's access to sewer connection; landowner sought injuction against continued blockage.

however, the Court strained to explain to plaintiffs, who were represented by counsel, how they could "fix" their complaint. The Court goes so far as to suggest, pg. 5, attached, that the complaint could be saved if plaintiffs would add allegations that the City conspired to maintain faulty sewers for racial purposes. While it seems preposterous to suggest that a City would conspire to maintain faulty sewers for any reason, the ultimate irony is that plaintiffs were white, in a predominantly white community. Plaintiffs did not re-file their action.

2-Telephone company placed conduit in street blocking the path for certain landowners' sewer connections. The City does not control the positioning of such conduits; and plaintiffs' counsel privately admitted that he joined the City simply to encourage the City to act on plaintiffs' behalf. Case was filed in state court on a tort theory. When faced with a motion to dismiss based on state law immunity, the plaintiffs hastily amended to allege vague constitutional violations, which were never detailed. Motion to dismiss was filed to the complaint, then the amended complaint, then the second-amended complaint; and case was dismissed, post-Monell. Decision of Owens prompted a motion for reconsideration which, after further briefing, was also denied. Case required extensive, unnecessary effort, considering that the City not only did not belong in the case, but also that plaintiffs already had a seemingly solvent defendant before the court - the phone company.

3-plaintiff was being pursued by police for a lawful charge at high speed through several cities. When finally stopped, he claimed police beat him. Suit was filed in both federal and state court against each City he passed through during the chase, along with "John Doe" police from each City. This City was never involved in the chase or arrest. Motion to dismiss and brief required by several cities until plaintiff chose to dismiss those which shouldn't have been joined in the first place.

EXHIBIT N-7

WILLIAM T. McLAUGHLIN
MAYOR

City of Wilmington, Delaware
City/County Building · 800 French Street 19801
Law Department (302) 571-4200

May 1, 1981

William S. Rhyne, Esquire
Deputy General Counsel
National Institute of
  Municipal Law Officers
1000 Connecticut Avenue, N.W.
Suite 800
Washington, DC 20036

Re: Supplemental Questionnaire
for Senate Committee Hearings

Dear Bill:

By letter of April 27 I sent you a description (with news clipping) of a local incident in which the presumed likelihood of §1983 litigation, even though surely defensible, had a deleterious effect on administrative decision-making. It seems to me that the recent supplemental questionnaire is addressed to a similar aspect of the phenomenon. Which is to say that you are inquiring about frivolous suits, the totally illogical and untoward suits which nonetheless are not readily dismissed, precisely the types of suits which vex local administrators and employees. Accordingly, I again commend NIMLO's efforts for the advisability and accuracy of its approach.

1. Frivolous §1983 claims. Although you have asked for those which are pending, there is one which has closed which I believe is especially noteworthy. Enclosed in that regard are some materials in litigation styled as Saunders v. Burke (labeled "A"). Saunders was an inmate convicted of robbery. In affirming his conviction, the Delaware Supreme Court had noted, in passing, that an *ex parte* conference between the judge, prosecution, and police witness was inappropriate, though not fatally defective. From prison, Saunders filed a *pro se* claim for a million dollars over the incident. (Copy enclosed.) The district judge dismissed the complaint *ab initio* against the defendant prosecutors, based upon prosecutorial immunity. Our officer, a good sergeant who attended the chambers conference at the express direction of the prosecutors, remained as the only defendant. (Memorandum opinion enclosed.)

Not wholly without logic, our liability carrier was somewhat reluctant to accept coverage, since the insuring clause spoke in terms of "false arrest" or "slander", and said nothing about the precise subject at hand, a chambers conference. Nonetheless, coverage was accepted and the case was dismissed on motion. (Final memorandum opinion enclosed.) Thereafter, however, Saunders filed an appeal to the Third Circuit, which eventually granted a motion to dismiss for inactivity in prosecuting the appeal. The net result included nine months of unease by a good officer, a minor tiff with our liability carrier, and an expenditure of $1,215 in time by insurance carrier's counsel, which we ultimately had to assume under our deductible.

Another frivolous matter, and one which is pending, is styled as Bailey and Rose v. Wilmington Police Department (labeled "B"). This is a claim for $200,000 on behalf of two convicted armed robbers who contend that their constitutional rights were violated when our police took them out into the weather and then into a patrol car in hospital gowns, their civilian clothes having been confiscated. We are preparing for trial on this one, since there may be a kernel which is not subject to ready dismissal. However, I still consider it frivolous that something like this can be filed for $200,000, that all sorts of frivolous motions have been filed in the interim seeking irrelevant discovery, that the suit has been pending for greater than two years, and that there are at least fifty-two docket entries. (A sample is enclosed.)

Another item I would consider frivolous, at least as initially filed, is litigation styled as Lenick v. City of Wilmington (labeled "C"). Enclosed is a photocopy of a local news clip which sets forth the background. Note the glaring headline that "Ex-policeman files $1 million suit against city officials". The state defendants have been let out on a theory of prosecutorial immunity and the local police department is left holding the bag. Please understand that this litigation is pending, and I cannot absolutely predict that there is no exposure. However, I consider it frivolous that litigation like this is filed with a $1 million damage prayer, with the inevitable news article to follow; I also consider it frivolous that if the underlying events were so imbued with injustice as to warrant a $1 million filing, nonetheless the complaint was logged two years after the events ensued; I also consider the blunderbuss initial complaint to be frivolous. (Incidentally, current counsel for the plaintiff (a former assistant county attorney) has taken the admirable step of filing an amended complaint, which does not include a specific dollar amount in its damage prayer, and which otherwise tends to scope down some of the allegations.)

2. and 3. Attorney's fees. Since we have not lost any §1983 litigation in the past five years, there have been no fee awards against us. In those cases in which we have prevailed, I have not sought fees, knowing that the prevailing standard would not permit it. (Or, in the case of prisoner litigation, as noted above, knowing that realizing collection would be nigh impossible.)

4. Judgments and settlements. As mentioned, we have had none go to judgment against us. Two have been settled, and I believe they illustrate a significant point addressed by your supplemental questionnaire. In one, we were sued for multiple millions of dollars in connection with an incident where an informant had supplied an erroneous address, with the result that a search warrant was executed at the home of an innocent man; in the course of that search, the owner was shot in the arm. That was settled for $26,000. In the other matter which was settled, a suit basically alleging false arrest, the initial damage allegation was $400,000, and yet plaintiff's counsel's opening demand, within days thereafter, was $10,000; the litigation was promptly settled by our insurance carrier for $4,000, without enthusiasm on our end, since we would have preferred trial.

As both of these settlements illustrate, the final settlement was a small fraction of the amount originally claimed. Yet, when filed and pending, they are a source of concern to municipal employees and a source of adverse news to a municipality. Further, and I believe this is quite significant, both of these cases could have been filed in the state courts, without the additional rubric of "civil rights", and, given that the carrier handled both of these, I assume that the same types of settlements would have been made. Not that I can extrapolate very far on our limited experience (given the size of our town and docket), but I venture to predict that if your questionnaire unearths a significant amount of settlements in §1983 litigation, the cases settled will probably be those which would have had some merit anyhow as common law tort litigation in state courts or, in the personnel sphere, as grievances brought before an arbitrator or civil service commission.

5. Equitable/injunctive relief. I assume this inquiry has to do with S. 990, and the confusion which would ensue. Our files reflect the advisability of your inquiry. In four of our eight pending §1983 cases, plaintiff's counsel has attempted to style his litigation as equitable in nature. All four are of the "personnel" variety. These cases claim to seek injunctive relief in the nature of reinstatement, and then add a prayer for "further equitable relief as may be appropriate, including back wages" or "in the alternative, back pay", etc. The back-pay component is very significant in size, particularly when plaintiff's counsel nearly exhausts a statute of limitation before filing, and particularly as the litigation drags on through discovery stages thereafter, as yet another plaintiff's counsel seeks to educate himself or herself to personnel law and process. In point of fact, in two of these cases I know first-hand, not only from plaintiff's counsel but from the plaintiffs themselves, that they have absolutely no desire to be reinstated, and that, in fact, they want nothing further to do with employment by the City.

Yet, personnel litigation is always going to be styled as "equitable" in the first instance. The result will be continuing litigation over the "essential nature" of the cases. It is not unreasonable to suppose that there will be further bifurcation in such litigation. As you know, there already is a sizable amount of confusing (and might I say, unsatisfactory) jurisprudence on the ambiguous issue of jury trial availability between issues "legal" and "equitable" in nature. There will be even further incentive to push the issue should the characterization of a case or claim also determine whether the defendant is entitled to a "good faith" defense.

I hope this has been of some assistance.

Very truly yours,

JEFFREY S. GODDESS
City Solicitor

jam
Enclosures

cc John Dekker, Esquire (w/o encs)
President, NIMLO

EXHIBIT N-8

CITY OF ABILENE
LEGAL DEPARTMENT

Harvey Cargill, Jr.
City Attorney

Gary C. Landers
First Asst. City Attorney

Janis Reinken
Ronald H. Clark
Robert D. Andron
Asst. City Attorneys

April 30, 1981

National Institute of Municipal Law Officers
1000 Connecticut Avenue, N.W., Suite 800
Washington, D.C. 20036

Re: Questionnaire for Testimony by NIMLO Members Before the Subcommittee on the Constitution of the Senate Judiciary Committee on S. 584 and S. 585 to Amend 42 U.S.C. SEC. 1983 on May 6 and 7, 1981.

Dear Sir:

As per your request, I am sending you the facts requested in the above referenced questionnaire.

Sincerely,

Harvey Cargill

Harvey Cargill, Jr.
City Attorney

HCJr/clc

Enclosures

Abilene, Texas

ANSWERS TO QUESTIONNAIRE

1. (a) Krishna Lawsuit-
The City of Abilene was sued to prevent criminal charges from being filed for trespassing on the County owned fairgrounds. The City of Abilene had no control or responsibility over the grounds. The City was dismissed from the suit after an Answer, Motions, a Court Hearing, and several phone conversations.

(b) Obscene Book Store-
The City of Abilene was sued after two (2) separate City Police Raids. The raids were directed by the Criminal District Attorney. The Criminal District Attorney is an elected official State Official and is not a City Official. If there is an error; the error was one of judgment on the part of the District Attorney. The District Attorney will be afforded, either qualified or absolute immunity. The possible damages are about $50,000 plus attorney fees. At this time the Court has abstained from hearing the case and will delay further proceedings until the criminal cases are disposed of. This Court action was taken as a result of a motion by the City being filed in the case.

(c) Single Member District-
This is the second lawsuit filed to force the City of Abilene to go to single member districts. Percentage wise, the Black and Mexican population total is 6 and 10%, respectively. In the first lawsuit the Plaintiffs attempted to create a new class, of voters, Black, Browns and Poor Whites (because of the fewness of the Blacks and Browns). The Plaintiffs dismissed the first lawsuit and explained in Open Court that there were evidentiary deficiency in their case, after a great deal of work and discovery was completed.
The second lawsuit was filed within a month after letters were sent to Congress expressing dissatisfaction about legal aid's use of public funds for impact litigation. The proper defense of Single Member District suit requires a great deal of information to be compiled and staff time to be expended.
The most distressing thing is that because of the fewness of minorities in Abilene if Abilene is voting on racial lines (which it is not) it is impossible to constitute districts that could elect a minority candidate.

2. NONE

3. NONE

4. NONE

5. All the above noted cases requested injunctive relief.

EXHIBIT N-9

ARLINGTON COUNTY, VIRGINIA
OFFICE OF THE COUNTY ATTORNEY
COURT HOUSE
ARLINGTON VIRGINIA 22201

558-2705

JERRY K. EMRICH
COUNTY ATTORNEY

CHARLES G. FLINN
DEPUTY COUNTY ATTORNEY

ASSISTANT COUNTY ATTORNEYS
LAWRENCE D. TARR
CHARLES E. WILLIAMS
DAVID R. LASSO

May 15, 1981

Charles S. Rhyne, Esquire
National Institute of Municipal Law Officers
1000 Connecticut Avenue, N.W., Suite 800
Washington, D. C. 20036

Dear Charlie:

I enclose a copy of an Order and Memorandum Opinion of Judge Bryan in one of the strip searches cases which I'm sure you've read about in the newspaper. This case was the third in a series of three cases. You will note that the plaintiffs dismissed their case with prejudice. In both of the earlier cases, the Court held that the strip search policy was valid. The first case is on appeal to the Fourth Circuit. In the second case, the plaintiff's own expert testified that the strip search was appropriate under the facts of that case. You will note that Judge Bryan makes no finding of the violation of any federal right. We argued that attorney's fees could not be awarded unless it was established that there was liability for the violation of a federal right although there did not have to be a formal adjudication. Judge Bryan awarded attorney's fees solely on the basis that the plaintiffs were successful in causing a public official to change his policy.

Judge Bryan didn't even mention the cases we cited with regard to the need to find liability. In the case of Smith v. University of North Carolina, 632 F.2d 316, 351 (4th Cir. 1980), which cited and relied on Hanrahan v. Hampton, 100 S. Ct. 1987 (1980), the Court stated:

> "It is evident also that Congress contemplated the award of fees pendente lite in some cases. S. Rep. No. 94-1011, supra, at 5; H. R. Rep. No. 94-1558, supra, at 7-8. But it seems clearly to have been the intent of Congress to permit such an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal."

The practical effect of Judge Bryan's ruling, if upheld on appeal, is to induce people who are interested in causing a change in public policies which may not violate a federal right to file a frivolous federal lawsuit. It is entirely possible that public officials as a result of publicity generated by the lawsuit would decide that it was appropriate to change a policy although it did not violate a federal right. Judge Bryan's opinion would support the award of attorney's fees in that instance. It is difficult to believe that

Congress intended that the federal courts could promote the changing of state policies through the mechanism of awarding attorney's fees. I hope this decision will be of some assistance to you when attempting to get Congress to bring some sense into this whole area.

The good news of the opinion is that Judge Bryan has concurred with Judge Lewis' ruling that Virginia counties are not liable for the actions of sheriffs. See pages 5 and 6. I have received a number of inquiries from municipal attorneys in other parts of the country on this issue as a result of my presentation at the Spring Seminar. This part of the decision may be of some interest. I'll send it along to those who have contacted me.

Best regards,

Jerry K. Emrich
Arlington County Attorney

JKE:lmb
Enclosure

EXHIBIT O

QUESTIONNAIRE FOR TESTIMONY BY NIMLO MEMBERS BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE JUDICIARY COMMITTEE ON S. 584 AND S. 585 TO AMEND 42 U.S.C. SEC. 1983 ON MAY 6 AND 7, 1981.

1. Briefly describe the facts in any frivolous 1983 claims pending against the city; the amount of damages sought. Attach pleadings or motions you think will better inform the congressional readers of the hearings record. Explain the frustration of municipal defendants in getting frivolous claims dismissed.

In 1979 portions of a fertilizer plant in Brooklyn Center, Minnesota were destroyed by fire. The plant was a non-conforming use and reconstruction was permitted pursuant to the zoning ordinance. Numerous variances from the zoning and construction codes were requested, e.g., street setbacks, drainage requirements, platting requirements, parking requirements, etc. Certain variances were granted and others denied. An explosives permit (to loosen caked fertilizer) was denied. An amortization ordinance phasing out the ammonia fertilizer process after 25 total years of operation was enacted. Plaintiff claimed that because its fertilizer plant was a valid non-conforming use, all ordinances enacted subsequent to original plant construction in 1946 were inapplicable. Civil rights violations were alleged. Damages claimed were "in excess of $50,000" against seven city officials and the corporate body. No attempt was made to prove the Sec. 1983 claims at trial. The Court found in favor of the City on all counts (including a counter-claim for nuisance) but declared the denial of the explosives permit to be invalid and found that the time limit in the amortization ordinance did not allow sufficient time for recoupment of recently installed pollution control equipment costing approximately half a million dollars. The Court found no violation of Sec 1983 and denied the request of the City and public officials for payment of approximately 15% of their total attorneys fees which were allocated to defense of the Sec. 1983 claims.

2. List any unusually large attorney's fees awards in relation to the amount of damages awarded against the city.

3. Briefly describe any cases in which the city prevailed and sought attorney's fees which were denied.

4. List the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claimed

5. Indicate the kinds of cases nominally styled equitable or seeking injunctive relief which would result in monetary municipal liability without some sort of absolute, or qualified good faith, immunity in equitable/injunction cases.

EXHIBIT P

DEPARTMENT OF
LAW
Renée C. Ricciardelli, ESQ., DIRECTOR
2090 GREENWOOD AVENUE, CN00150, HAMILTON, NEW JERSEY 08650 Phone 609/890-
3816

April 24, 1981

NIMLO
1000 Connecticut Avenue
N.W., Suite 800
Washington, D.C. 20036

Attention: John Dekker, Director of Law

Re: Questionnaire - Civil Rights Lawsuits

Dear Mr. Dekker:

Enclosed please find questionnaire which I have completed to the best of my knowledge in regard to the above referenced matter.

I trust that this is responsive to your inquiry. If you have any further questions concerning same, please do not hesitate to contact this office.

Very truly yours,

Renée C. Ricciardelli

Renée C. Ricciardelli
Township Attorney

RCR:dav

Enclosure

Hamilton, New Jersey

QUESTIONNAIRE FOR TESTIMONY BY NIMLO MEMBERS BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE JUDICIARY COMMITTEE ON S. 584 AND S. 585 TO AMEND 42 U.S.C. SEC. 1983 ON MAY 6 AND 7, 1981.

1. Briefly describe the facts in any frivolous 1983 claims pending against the city; the amount of damages sought. Attach pleadings or motions you think will better inform the congressional readers of the hearings record. Explain the frustration of municipal defendants in getting frivolous claims dismissed. 1) Action by Municipal Clerk of opposing party claiming political discrimination - $250,000.00. Cost Township $70,000.00 to defend. 2. Action by concert promotion claiming governing body refused to allow rock concerts because of rioting deprive him of civil rights. Also claim against police officers in not controlling "gate crashing". Demanded damages approximately $20,000.00 plus order requiring further concerts. Cost Township $25,000.00 to defend. 3) Action by dismissed employees claiming deprivation of "property" without due process.

2. List any unusually large attorney's fees awards in relation to the amount of damages awarded against the city.

3. Briefly describe any cases in which the city prevailed and sought attorney's fees which were denied.

In cases where Township prevailed, advice from consulting attorney was to not press for attorney's fees since likelihood of success was minimal. (Not worth added fees to prosecute.)

4. List the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claimed

Township has prevailed in all 1983 cases.

5. Indicate the kinds of cases nominally styled equitable or seeking injunctive relief which would result in monetary municipal liability without some sort of absolute, or qualified good faith, immunity in equitable/injunction cases.

EXHIBIT Q

City of Wilmington, Delaware
City/County Building · 800 French Street 19801
Law Department (302) 571-4200

WILLIAM T. McLAUGHLIN
MAYOR

April 27, 1981

William S. Rhyne, Esquire
Deputy General Counsel
National Institute of
  Municipal Law Officers
1000 Connecticut Avenue, N.W.
Suite 800
Washington, DC 20036

Re: Civil Rights Amendments

Dear Bill:

This follows our conversation of two weeks ago when we were together in Washington at the NIMLO seminar. I mentioned that I was fully in support of amendments to the Civil Rights Acts which would restore rationality and fairness to that burgeoning area of federal litigation. Even while the NIMLO survey of pending litigation might prove useful, I thought it would also be useful were we able to compile some documentation of a more amorphous facet of the problem, namely, the deleterious effect the threat of such litigation has had upon state and local government decision-making. I offered our recent, local example, and offer it again with this report.

In mid-1980, it was perceived that some $19,000 of previously confiscated funds might be missing from the police evidence room. A criminal investigation was commenced, which, despite a significant amount of effort, essentially led nowhere. With the concurrence of the Delaware Department of Justice, the Wilmington Police Department then moved over to a civil, administrative investigative mode. (This decision was analyzed in terms of the holdings in Garrity v. New Jersey, 385 U.S. 493 (1967) and Gardner v. Broderick, 392 U.S. 273 (1968).)

The investigators, as part of the new phase of the investigation, doubled-back to reinterview many of the individuals who were previously interviewed, this time, of course, with the ability to compel answers to questions. They also directed that polygraphs be taken.

One officer, a sergeant, who previously had been the evidence room clerk, who had at first denied any knowledge or involvement, then took the polygraph and the results showed some deception. Confronted with the deception, he then confessed to having taken unknown sums (he didn't keep a ledger) which might have been as high as $3,500. Disciplinary charges were lodged.

Now I was not at the man's trial board, so I don't know specifically what evidence was or was not presented. I understand that this sergeant had a strong amount of sympathy going for him, given that he was less than a year from retirement and was evidently undergoing emotional turmoil back when he took this money. However, the basic, bottom-line fact of the matter is that a sergeant, sworn to uphold the law and paid by taxpayers, stole a significant amount of money, later lied about it to his fellow officers, and only told the truth under compulsion. The trial board imposed a punishment of just fifty days, without even a reduction in rank, let alone discharge, a punishment which many of us feel was unconscionably low. In less than a year, this officer will be going out on pension at half-pay, the ordinary retirement pension, for the balance of his life.

The local press, needless to say, was not favorably taken with the results. Indeed, they picked up the unfortunate irony and pressed it hard. Enclosed is a column illustrating the press criticism. After it ran, I attended a meeting with the three trial board captains, who were rather bitter at taking the brunt of criticism for the internal disciplinary system. In fairness to those gentlemen, they are three distinguished captains who had the unfortunate luck to serve on the trial board, being some of the few men of rank who had never previously served in the evidence room. Also, at least two of them have reputations for being fairly stern disciplinarians and one, in fact, had previously been in charge of Internal Affairs and had directed it admirably, with firmness.

In explaining their rationale, they pointed to a departmental statute of limitations. They pointed to other concerns they had for procedural due process. Respecting all that, I suggested that procedural due process had been served and yet, clearly, the basic substantive charge had been proven--indeed, admitted--and asked why they didn't at least reduce his rank, if not fire him. To that, they replied that one of their concerns was being on the receiving end of a "civil rights suit". They did not want to risk being sued for discharging or demoting an admitted thief.

You already have the current figures for Wilmington, our eight civil rights cases. Even though this may tend to cut back against another line of argument, I can point out that we have not lost one of these cases in recent memory. (We settled one in 1978, involving a shooting when a search warrant was executed at an erroneous address, but that was basically in the nature of a tort suit filed under §1983.) Yet, in further fairness to the trial board captains in this instance, I would have to agree that nary a significant disciplinary action is taken, in terms of heavy penalty days, demotion, or discharge, which does not result in either §1983 litigation or a Title VII complaint to the EEOC. (In that latter regard, our record also remains unblemished.)

I would suggest that even a string of successful defenses over the past four years has done nothing to stem the tide of these filings. Under the current state of the law, such filings are virtually riskless for plaintiffs, particularly if the disgruntled individual is a former employee. Also, while I imagine the decision-makers in Wilmington do take heart from the defense work we perform in the Law Department and the results we achieve, at least in this one instance I can document that some degree of concern over the possibility of "civil rights litigation", apart from its likelihood of success, has substantively affected the decision-making process, and not for the better.

I observe that judges are paid to make decisions, and presumably can devote their entire efforts to that task. They enjoy absolute immunity for their mistakes. They have the opportunity to avoid the immediate vexation of having to deliver bad news directly; that is, they can issue their decisions in writing, sending the bad news by mail, many months after the event, and never see the recipient thereafter.

Conversely, decision-makers in local government enjoy none of these advantages. Their tasks are varied; they don't have the luxury to keep fully abreast of all developments and don't always have issues neatly framed in adversarial pleadings; they do not enjoy absolute immunity for their mistakes; they live and work in and amongst the litigants and would-be litigants, without the insulation of a courthouse atmosphere. To be sure, they are defended at City expense, and we have been successful of late. However, they are then told by me, at the close of such a case, that we will not waste effort in a countersuit for defamation or abuse of process, that the court will not award us fees, and that they should simply bear the bad press and the concern as part of the job.

Frankly, after my meeting with those captains, while I still don't support the lenient punishment they imposed, I can understand how it came to be. An officer can be second-guessed by the Chief, by the City Solicitor, or by the Mayor (or, in this instance, by the press); however, so long as the federal courts remain as a final, riskless step in the personnel administration of state and local governments, even the most vigorous will become shy and reluctant.

Very truly yours,

JEFFREY S. GODDESS
City Solicitor

jam
Enclosure

EXHIBIT Q-1

City of Newport News

Office of the City Attorney

2400 WASHINGTON AVENUE
NEWPORT NEWS, VIRGINIA 23607

PHONE (804) 247-8416

ROBERT V. SEALE
CITY ATTORNEY

LEONARD E. RINGLER
First Assistant City Attorney
ASSISTANTS
LEONARD A. WALLIN, II
WILLIAM C. JOHNSON
KRIS J. SUNDBERG
VERBENA M. ASKEW

May 7, 1981

Mr. John Dekker, Esquire
Director of Law
Wichita, Kansas

Re: Questionnaire regarding civil rights lawsuits

Dear Mr. Dekker:

Please find enclosed herewith the questionnaire in regard to the above referenced matter, which you requested in your memorandum dated April 20, 1981.

Sincerely yours,

Leonard E. Ringler

Leonard E. Ringler
First Assistant City Attorney

LER:sah

Enclosure

Newport News, Virginia

QUESTIONNAIRE FOR TESTIMONY BY NIMLO MEMBERS BEFORE
THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE
JUDICIARY COMMITTEE ON S. 584 AND S. 585 TO AMEND
42 U.S.C. SEC. 1983 ON MAY 6 AND 7, 1981.

1. Briefly describe the facts in any frivolous 1983 claims pending against the city; the amount of damages sought. Attach pleadings or motions you think will better inform the congressional readers of the hearings record. Explain the frustration of municipal defendants in getting frivolous claims dismissed.

Suit was filed against the School Board claiming it had a resegregated school system. Injunctive relief was the basic remedy sought. Although plaintiff's attorney was unable to present his case with adequate skill and although many claims were essentially make-weight and frivolous (District Court judge described several issues as "almost frivolous"), no claims were dismissed in the action until its final resolution. Many claims should have been culled out at the preliminary stages of the litigation. The School Board was therefore required to defend many unnecessary issues and the entire litigation process was unwisely extended resulting in waste in terms of cost and time expended.

2. List any unusually large attorney's fees awards in relation to the amount of damages awarded against the city.

N/A

3. Briefly describe any cases in which the city prevailed and sought attorney's fees which were denied.

School Board was sued for actions which allegedly recreated a segregated school system. The Board prevailed on the one major issue and 18 of 20 collateral issues (as described by the Judge in the case). Board's request for attorney's fees was denied.

4. List the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claimed.

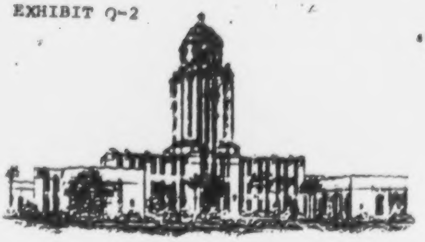
N/A

5. Indicate the kinds of cases nominally styled equitable or seeking injunctive relief which would result in monetary municipal liability without some sort of absolute, or qualified good faith, immunity in equitable/injunction cases.

N/A

EXHIBIT Q-2

OFFICE OF THE CITY ATTORNEY:
CHARLES D. HAUGHTON
CITY ATTORNEY
JACK ALLEN
SR. ASS'T CITY ATTORNEY
STEPHANIE ROSE SCHER
ASS'T CITY ATTORNEY
ROBERTA S. KALLAN
ASS'T CITY ATTORNEY



450 NORTH CRESCENT DRIVE
BEVERLY HILLS, CA 90210

AREA CODE 213
TELEPHONE 550-4877

CITY OF BEVERLY HILLS

May 20, 1981

NIMLO
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

Re: Civil Rights Lawsuit

Gentlemen:

Please find enclosed the responses to your questionnaire.

If it will be of any assistance, the only Civil Rights litigation presently pending against this City is set forth in the Siplin complaint attached hereto. This City has a population of 32,000 with General Revenues of $27,400,000.

Very sincerely yours,

CHARLES D. HAUGHTON
City Attorney

By Jack Allen
JACK ALLEN
Sr. Ass't City Attorney

JA:kls
Encs.

"Beverly Hills, California

QUESTIONNAIRE FOR TESTIMONY BY NIMLO MEMBERS BEFORE
THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE
JUDICIARY COMMITTEE ON S. 584 AND S. 585 TO AMEND
42 U.S.C. SEC. 1983 ON MAY 6 AND 7, 1981.

1. Briefly describe the facts in any frivolous 1983 claims pending against the city; the amount of damages sought. Attach pleadings or motions you think will better inform the congressional readers of the hearings record. Explain the frustration of municipal defendants in getting frivolous claims dismissed.

See attached sheet.

2. List any unusually large attorney's fees awards in relation to the amount of damages awarded against the city.

None.

3. Briefly describe any cases in which the city prevailed and sought attorney's fees which were denied.

See attached sheet.

4. List the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claimed.

None in recent past.

5. Indicate the kinds of cases nominally styled equitable or seeking injunctive relief which would result in monetary municipal liability without some sort of absolute, or qualified good faith, immunity in equitable/injunction cases.

Zoning, issuance of permits, revocation of permits, nuisance (torts).

ATTACHMENT TO NIMLO CIVIL RIGHTS QUESTIONNAIRE

1. Siplin v. City of Beverly Hills.

Complaint for employment discrimination. Black custodian who had been promoted to highest position available for custodians. City went to outside contract and [illegible] his position abolished. Because of seniority, he was assigned to another vacant position at the same pay. He had never applied for any position; hence had never been denied a promotion or assignment. (Copy of complaint attached.)

Holt v. City of Beverly Hills

Dismissed May 1981 by plaintiff, not court. Plaintiff juvenile, arrested on citizen arrest for shoplifting. Admitted shoplifting to store owner and police. Was taken to police station where given strip search by matron. Juvenile authorities refused to prosecute. Despite U.S. Supreme Court case holding directly on point that jail strip searches legal and immunity under California law for detention pursuant to citizen arrest, of which plaintiff's attorney was aware, 1983 action filed.

3. 1980. Two young men taken into custody on citizen's arrest by hotel security officers for suspected burglary and turned over to City Police. Both plaintiffs in a restricted area of a hotel where frequent burglaries had occurred. Plaintiffs released at hotel when story verified that they did know guest who they allegedly were visiting, though guest knew of no reason they should be in hotel coming to visit. Plaintiffs filed 1983 action. After court trial, verdict for City. Judge found action to be "completely frivolous" but refused to award attorney's fees because it would discourage persons from filing civil rights action. Cost City $7,500 to defend.

Indianapolis, Indiana

EXHIBIT Q-3

QUESTIONNAIRE FOR TESTIMONY BY NIMLO MEMBERS BEFORE
THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE
JUDICIARY COMMITTEE ON S. 584 AND S. 585 TO AMEND
42 U.S.C. SEC. 1983 ON MAY 6 AND 7, 1981

1. Briefly describe the facts in any frivolous 1983 claims pending against the city; the amount of damages sought. Attach pleasings or motions you think will better inform the congressional readers of the hearings records. Explain the frustration of municipal defendants in getting frivolous claims dismissed.

Please see our letter to the Director

2. List any unusually large attorney's fees awards in relation to the amount of damages awarded against the city.

Approximately $18,000.00 in fees on a award of nominal damages.

3. Briefly describe any cases in which the city prevailed and sought attorney's fees which were denied.

None. The suits for fees would have been a further waste of taxpayer monies as all the plaintiffs were judgment proof.

4. List the amount of Section 1983 judgments and settlements against yuour municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claimed.

Approximately Twenty Million dollars ($20,000,000.00). The overall percentage would be misleading because of one large case.

5. Indicate the kinds of cases nominally styled equitable or seeking injunctive relief which would result in monetary municipal liability without some sort of obsolute, or qualified good faith, immunity in equitable/injunction cases.

The range of cases covers the waterfront and currently ask for $84,186,000.00 in damages, $33,775,000.00 in punitive damages, and attorney fees. Our general revenues are $129,000,000.00

CITY OF INDIANAPOLIS

WILLIAM H. HUDNUT, III
MAYOR

JOHN P. RYAN
CORPORATION COUNSEL

LEGAL DIVISION
2560 CITY-COUNTY BUILDING
(317) 633-3360

RECEIVED
MAY 4 1981
DEPT. OF LAW

May 1, 1981

John Dekker
Director of Law
City of Wichita
Wichita, Kansas

Mr. Dekker:

The City of Indianapolis is currently subject to some twenty "frivolous" cases filed in federal courts ranging across the country from the Northern District of California to the District of Massachusetts.

Each case was filed by a prisoner, pro se. Each case sets out numerous chapters of the prisoner's life prior to the facts which led to his arrest and conviction. None of the cases in reality is anything more than an appeal of the prisoner's convicton or an appeal to be released from the consequences of his prior lifestyle. Obviously, neither type of appeal is authorized by the Constituion, statutes or rules.

The larger problem is that a one paragraph statute [42 USC 1983] enacted in 1871 has been construed thousands of different and often conflicting ways. The further problem is that the federal courts expect and demand that a City must show that there is no possible way the plaintiff can proceed under any theory before the court will dismiss the claim . The Catch 22 is that the theories range 360 degrees, requiring judgment calls based on "guesstimates" as to what the plaintiff's case should have been.

Stated differently Cities are being required to show the plaintiff and the federal courts what the plaintiff's best course of action is and then show why the plaintiff cannot proceed even under the "best course of action." All this requires up to 300 attorney hours per case and the amount of monies required to pay for that attorney time certainly is not recoverable from a prisoner plaintiff.

Page #2
John Dekker
May 1, 1981

The definition of the word frivolous is often affected by one's perspective. Our perspective has been an extremely good one generated by good community relations. Even so, the City has been subjected to numerous cases which are nothing more than an attempt to pursue a federal tort by some non-existent federal common law.

We have enclosed the Appendix and Brief of Respondents in Hildebrant v. Denver, No. 76-5416, Supreme Court of the United States.

The Respondents took the position that a federal common law creation of a federal tort via 1983 is contrary to the Erie doctrine and Amendment X of the Constitution of the United States. If appears to us that Senator Mathias in S. 990 is attempting boldly to create such a new federal tort more harmful than 1983. We oppose this attempt one hundred percent.

Thank you for the opportunity to respond.

Very truly yours,

John P. Ryan

JPR:ao

EXHIBIT Q-4

CITY OF YUMA
180 First Street Yuma, Arizona 85364 (602) 783-1271 x 200

April 28, 1981

Mr. Roy Bates
City Attorney
City of Columbia
P.O. Box 147
Columbia, South Carolina 29217

Dear Mr. Bates:

I have enclosed for your information a copy of a letter sent to the Arizona Congressional Delegation in regard to the adoption of the NIMLO drafted amendments to Sections 1983 and 1988.

This office has always had a very good relationship with Arizona's Congressional delegation and if we may be of any help in that regard, please do not hesitate to contact me.

In that Senator DeConcini is on the Senate Judiciary Committee which will be hearing the proposed amendments we would be available to work with his office should that be helpful.

Marvin Glink mentioned at the recent NIMLO meeting in D.C. to forward any comments we might have in regard to the attorneys fees' issue. My only comment is that I prefer the abolition of attorneys' fees in their entirety in regard to civil rights litigation, rather than extending the award of those fees to any successful litigant (whether or not a city), due to the fact that most plaintiffs who bring civil rights actions against government entities would not have sufficient resources to satisfy a judgment for attorneys' fees even if such judgment were obtained by a city.

Again, I wish your committee success in its endeavors and if I may be of any help, please do not hesitate to contact me.

Sincerely,

Maureen R George

Maureen R. George,
City Attorney

MRG/sr
Enclosure
cc: Charles Rhyne

[From the Sunday News Journal, Mar. 29, 1981]

BADGES HIDE SOFT HEARTS

[By Ralph Moyed]

If I ever get caught with my hand in the petty cash drawer, the people I want on my jury are Bill Lynch, Bob Longyear and John Johnson.

The three men all are captains with long service on the Wilmington police force. They are professional, tough cops and each has heard his share of sob stories from thieves with family and emotional problems.

But you just never know when you are going to find a heart of gold beating beneath a tough policeman's badge.

It is unusual, I suppose, when you draw three cops with hearts of gold to serve as your judge and jury. That's what happened to Robert McGowan, 46, of the 1400 block Sycamore Street.

McGowan is the police sergeant who was accused of stealing $1,700, more or less, from Wilmington police evidence lockers between 1972 and 1975. Longyear, Lynch and Johnson were assigned to the trial board that heard the departmental charges.

They found him guilty of giving false information and withholding information, and they decided he did deserve some sort of punishment.

As you probably know, the three captains let McGowan off with 30 days of extra duty and a 20-day suspension, all without pay. There was no firm evidence that McGowan continued ripping off the department—and his brother officers—beyond 1975, when the statute of limitations wouldn't apply. So McGowan will not be prosecuted in the criminal courts.

The extra duty and suspension will cost McGowan $4,400 in lost pay and he will have to pay back what he stole—when authorities find out how much it was. But the officer will be permitted to serve out his 20 years, retire and collect his pension, which, if he lives out his allotted time, will add up to about a quarter million dollars.

The decision must have been particularly difficult for Longyear, hero of the Home Box Office investigation of 1975. Two officers were forced to resign for getting HBO service hooked up in policemen's homes without paying for it.

All McGowan did was steal forfeited money that would have gone to the police pension fund if he hadn't gotten his hands on it first.

The three compassionate captains knew that McGowan had only a year to go before retirement, that he was a thief for only three of his 19 years, and that he would have lost his pension if they dumped him from the force.

Of course, he cooperated—after he flunked a lie-detector test.

Since the first story appeared, I have learned more about McGown's trial. McGowan brought a psychiatrist instead of a lawyer to his hearing.

It seems that McGowan was having family troubles when he pocketed the money. His wife wasn't well and McGowan was having emotional problems of his own. In fact, he was so confused when he stole that he couldn't remember exactly how much he took.

Consider what would have happened to you if your boss caught you dipping into the till to the tune of $1,700.

Try to picture the looks on the faces of those three police captains when you pleaded for a break on grounds that you were too emotionally distressed to know how much you stole.

It would have been very interesting to see their reaction when they discovered that you stole money intended for deposit in the police pension fund.

One of the faults of the police trial system is that brother police officers investigate and judge each other. Another problem is that in Wilmington, the police chief has no power to overturn the decisions of trial boards.

The current investigation is not over with the McGowan verdict. As much as $19,500 may be missing from the police evidence lockers. According to police, two officers have been ordered to take lie-detector tests and one, Patrolman John Curran, has been refusing.

Even some law-enforcement folk doubt the value of polygraph tests. But the Wilmington police have a rule that an officer who refuses to take one can be thrown off the force. At last report police officials were reluctant to enforce the rule for fear that a court might decide that the fired officer's rights were violated.

I believe cops are entitled to the same rights as private citizens, maybe more. Punks who beat up on policemen or otherwise violate the laws we have fashioned to protect law-enforcement officers deserve severe punishment. The law also should go hard on cops who violate their trust.

McGowan's trial board obviously disagrees.

What the verdict means is that the next cop who stops you may be a thief.

EXHIBIT R

CITY
OF SALEM,
OREGON
City Hall / 555 Liberty St. S. E.
Zip Code 97301
LEGAL DEPARTMENT
Telephone (503) 588-6003
William J. Juza
City Attorney

April 27, 1981

Mr. John Dekker, President
National Institute of Municipal Law Officers
1000 Connecticut Avenue N.W., Suite 800
Washington, D.C. 20036

Re: Facts as to 1983 Actions Against the City of Salem

Dear Mr. Dekker;

The questionnaire distributed by you on April 20, 1981, requests information on five specific points which we will respond to in the order appearing on the questionnaire:

1. The only 1983 claim which has been filed against the City of Salem is a case called Fleetwood v. F.B.I., et al. Although the plaintiff in that case did not denominate Section 1983 as the basis for his action, it is the only statutory grounds for jurisdiction of the federal court remotely assertable under the facts. In that case, the local F.B.I. office had received information from an informant to the effect that Mr. Fleetwood was attempting to sell stolen U. S. Government bonds. The F.B.I. investigated the case and obtained sufficient information to initiate prosecution and obtain an arrest warrant. Because the case involved U. S. Treasury obligations, they then turned the case over to the Secret Service. The Secret Service and the F.B.I. jointly went to Mr. Fleetwood's home in Salem to make the arrest under the warrant. Prior to that they called our local police department, as is their standard practice, to inform us that an arrest was to be made in our city and to request that a city officer be present in the event that there might be some necessity for enforcement of state criminal laws or the necessity for obtaining assistance from the city police. Accordingly, several Secret Service agents, F.B.I. agents, and one city police detective went to Mr. Fleetwood's home where they found Mr. Fleetwood in his garage. The Secret Service agents approached Mr. Fleetwood to effect the arrest, and one F.B.I. agent and our detective stood on the sidelines watching. Mr. Fleetwood's son-in-law came out of the house and engaged in a brief discussion with the F.B.I. agent and our detective at the door of the house, and then invited the two officers in to continue the discussion. The F.B.I. was at that time concerned about the possibility of interstate transportation of stolen property in view of the fact that the bonds had been stolen in a burglary occurring in the state of Washington. The son-in-law, the F.B.I. agent, and our

detective entered the door of the house, went a few steps down a hallway, turned left into the living room, and continued their discussion for a brief period of time. By this time, Mr. Fleetwood who had been handcuffed and was being taken to the Secret Service car, saw the officers enter the house and began to raise a commotion about the police entering his house. The F.B.I. agent, hearing this, suggested to the son-in-law that they resume their discussion outside the house, which they did. It was only for a matter of brief minutes that our detective and the F.B.I. agent were in the house. During that time they conducted no search, entered no rooms other than the hallway and living room, and other than contact with floors and chairs necessitated by the universal law of gravity, touched nothing in the house.

Mr. Fleetwood was complaining vehemently about having been handcuffed with his hands behind his back because he claimed that this position exerted painful pressure on his throat which he said was cancerous. Because of his continued complaints, the Secret Service agents determined that he should be taken to the hospital for observation. Our detective sat in the backseat of the Secret Service car with Mr. Fleetwood on the way to the hospital and then had no further contact with him.

Mr. Fleetwood was tried on the charge of attempting to sell the stolen U. S. Savings Bonds, and was convicted by a jury in federal court. Upon return of the verdict, his attorney moved for a judgment of acquittal on the basis that title to U. S. Savings Bonds vests in the lawful bearer of the bond and not the U. S. Government. The statute under which the prosecution was brought is the Federal Embezzlement statute and his argument was that the defendant could not be guilty of converting the property of the United States government since title to the bonds vested in the bearer. A visiting federal court judge from the District of Alaska considered and granted that motion for a judgment of acquittal. The government appealed to the 9th Circuit but in the course of personnel turnover in the Portland U. S. Attorney's office, the appeal was abandoned.

Mr. Fleetwood then brought an action in federal court against the F.B.I., the director of the F.B.I., every F.B.I. agent mentioned in any of the reports on the case, the F.B.I.'s paid informant who initially brought the case to that agency's attention; the Secret Service, the director of the Secret Service, all of the Secret Service agents involved in the case; the Attorney General of the United States; and our detective. The suit asked for $100,000,000 in general damages and $500,000 in punitive damages. Although you will note from the pleadings that there are several general allegations as to "defendants" in the collective, the only specific allegation of wrongdoing by our officer is that he searched the plaintiff's house without a warrant and without other lawful authority in an attempt to discover some weapons and a secret bank account.

After the filing of the complaint, a spate of motions and pleadings followed. Mr. Fleetwood appeared in propria persona and it became rather difficult to manage the case from the standpoint of defense of our officer because of that fact.

The U. S. Attorney's office obtained a dismissal of the complaint as to the federal defendants because of inadequate service of summons, also having moved for dismissal against the federal government and its agencies and officers to the extent that the complaint alleged wrongdoing in their official capacity. The latter motion was not ruled on, but the former was granted leaving the only remaining defendant as our police officer.

Mr. Fleetwood asserted that he would amend his complaint to reinclude the federal defendants and a conference as to setting the time for completion of discovery and lodging of a pre-trial order was held. Subsequent to that conference we gave notice to Mr. Fleetwood of a date to take his deposition. Although he had that notice well in advance, it was only seven days before the time scheduled for the deposition that Mr. Fleetwood informed us that the date would be inconvenient for him and he suggested future dates past the time set by the court in its order for completion of discovery. We were able to convince him that he should respond to the notice to take his deposition or suffer the consequences under the federal rules, and he did appear at the time set for the taking of the deposition.

At that time, an assistant U. S. Attorney was present as well as an attorney for the city defending the officer. Mr. Fleetwood brought with him his son-in-law and nephew and a tape recorder. The attached deposition will give you some idea of the results of the attempt to obtain discovery from him at that time.

By this time, the City of Salem had expended in excess of $700 on the defense of the case, and it became increasingly apparent that no matter how frivolous this claim was on its face it would end up costing many times more than that amount to defend. We therefore determined to offer Mr. Fleetwood a nominal settlement in order to relieve ourselves from the burden of having to defend this frivolous claim. Mr. Fleetwood ultimately accepted a $200 settlement of this $100,500,000 lawsuit and the city officer was dismissed. I understand that Mr. Fleetwood did additionally accept some settlement from the federal government. The amount of that settlement I do not know.

2. Since the only 1983 claim we have faced involved the settlement of a case brought by a plaintiff in propria persona, there have been no attorney fee awards against the City of Salem on a 1983 claim.

3. The above discussion answers your third question.

4. The one case that we have had involved a claim for $100,500,000, a settlement of $200, and an administrative and defense cost in the neighborhood of $750. The settlement represents 19/100,000 percent (0.00019%) of the prayer in the complaint. The administrative cost, however, is 375% of the amount of the settlement.

5. Since we have had no experience with cases other than those seeking purely damages, we are not in a position to speculate on the issues

raised in question 5 of your questionnaire.

I trust this information will be of some benefit to you in asserting the reasonableness of S.584 and S.585, and anticipate that our city council will be adopting a resolution in support of those bills in the very near future.

If we can be of any further assistance, please let me know.

Yours very truly,

William G. Blair
Assistant City Attorney

WGB:sb
cc: Ron Hutchinson
Enc.

EXHIBIT S

CITY OF WINTER PARK WINTER PARK, FLORIDA 32789

OFFICE
OF THE
CITY ATTORNEY

April 27, 1981

National Institute of
Municipal Law Officers
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

Attention: Mr. Charles S. Rhyne

Re: City of Winter Park

Gentlemen:

In connection with your inquiry concerning claims against municipalities under 42 U.S.C. §1981, §1983 and §1985, please be advised that the only claim against the City of Winter Park of which I am aware is the following:

> An action captioned Robert L. Wilson v. the City of Winter Park, originally Case No. 75-338 in the United States District Court for the Middle District of Florida, was on September 30, 1980 and December 31, 1980 pending on appeal to the United States Court of Appeals for the Fifth Circuit, Case No. 79-2895.
>
> Robert L. Wilson ("Appellant") was employed as a Winter Park policeman and was terminated from employment by the City on June 13, 1975 for his social association with an alleged underworld figure in violation of direct orders to the contrary. Appellant alleges that he was terminated without having been afforded necessary notice and hearing allegedly required under the Fourteenth Amendment to the United States Constitution. Appellant seeks a declaratory judgment to the effect that his termination was wrongful under the United States Constitution, a mandatory

injunction reinstating him to his position, back pay and allowances lost by virtue of termination, as well as punitive damages. Appellant's total alleged compensatory and punitive damages are "in excess of $750,000." Appellant also seeks an award of attorney's fees in an unspecified amount.

On September 1, 1978, the District Court ruled that Appellant had been denied due process and ordered the City to either reinstate him or grant him a new hearing. The City granted Appellant a new hearing and again terminated him on November 21, 1978. On February 6, 1979, the District Court ruled that the City had properly terminated Appellant and that Appellant was not entitled to punitive damages. On June 6, 1979, the District Court entered final judgment awarding Appellant damages of $1.00. At a later hearing, the District Court denied Appellant any attorney's fees.

Briefs have been filed in the Court of Appeals and oral arguments before the Court of Appeals were held on November 5, 1980. The parties are awaiting a decision.

If the District Court's judgment in this case is ultimately affirmed by the appellate courts, loss to the City will be limited to its costs of defending the action plus damages of $1.00.

Very truly yours,

C. Brent McCaghren

CBM/rc

Ann Arbor, Michigan

EXHIBIT T

QUESTIONNAIRE FOR TESTIMONY BY NIMLO MEMBERS BEFORE
THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE
JUDICIARY COMMITTEE ON S. 584 AND S. 585 TO AMEND
42 U.S.C. SEC. 1983 ON MAY 6 AND 7, 1981.

1. Briefly describe the facts in any frivolous 1983 claims pending against the city; the amount of damages sought. Attach pleadings or motions you think will better inform the congressional readers of the hearings record. Explain the frustration of municipal defendants in getting frivolous claims dismissed. 1. Man discharged after repeated warnings not to wear hat and sun glasses at clerical job
2. Man convicted of numerous B+Es claims damages for seizure of the stolen goods.

2. List any unusually large attorney's fees awards in relation to the amount of damages awarded against the city.

3. Briefly describe any cases in which the city prevailed and sought attorney's fees which were denied.

4. List the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claimed
1 $15,000 (.75%) shooting of fleeing felon. 2. $7,500 (.75%) discharge of City Clerk. 3. $18,000 (.9%) raided wrong house.

5. Indicate the kinds of cases nominally styled equitable or seeking injunctive relief which would result in monetary municipal liability without some sort of absolute, or qualified good faith, immunity in equitable/injunction cases.
1. Challenge to validity of adult entertainment provisions of zoning ordinance. 2. Claim against validity of sign ordinance

Royal Oak, Michigan

EXHIBIT U

QUESTIONNAIRE FOR TESTIMONY BY NIMLO MEMBERS BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE JUDICIARY COMMITTEE ON S. 584 AND S. 585 TO AMEND 42 U.S.C. SEC. 1983 ON MAY 6 AND 7, 1981.

1. Briefly describe the facts in any frivolous 1983 claims pending against the city; the amount of damages sought. Attach pleadings or motions you think will better inform the congressional readers of the hearings record. Explain the frustration of municipal defendants in getting frivolous claims dismissed.

1. Japanese Sauna v City of Royal Oak - US Dist.Ct. Case #76-70917
   Challenge to City's Massage Parlor Ordinance
2. Glantz v City of Royal Oak - U.S.Dist.Ct.Case #80-72608 - False arrest suit
   Damages claimed $1,010,000
3. Davis, et al, v City of Royal Oak - U.S.Dist.Ct.Cases #81-70865, 70866 & 70867
   False Arrest Suit - Damages claimed $150,000
4. Joseph v City of Royal Oak - U.S.Dist.Ct.Case #81-71275 - False Arrest-Damages claimed / $1,550,000

2. List any unusually large attorney's fees awards in relation to the amount of damages awarded against the city.

Japanese Sauna v City of Royal Oak - Attorneys' fees & equitable relief - $12,000
No damages paid.

3. Briefly describe any cases in which the city prevailed and sought attorney's fees which were denied.

4. List the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claimed.

5. Indicate the kinds of cases nominally styled equitable or seeking injunctive relief which would result in monetary municipal liability without some sort of absolute, or qualified good faith, immunity in equitable/injunction cases.

Teresa E Schafer

Teresa E. Schafer, City Attorney
211 Williams Street
Royal Oak, MI. 48068

EXHIBIT U-1

City of
FRESNO

James A. McKelvey
City Attorney

April 30, 1981

John Dekker, President
National Institute of Municipal Law Officers
1000 Connecticut Avenue, N.W., Suite 800
Washington, D.C. 20036

Re: Proposed legislation to amend 42 U.S.C. Sec. 1983

Enclosed please find responses to the questionnaire submitted to this office through your letter of April 21, 1981. I trust that the information supplied will be helpful. Fortunately the City has not been victimized by an abundance of Section 1983 litigation. However, we see signs of an increase.

If you need further information or you believe this office may be of any further assistance, please do not hesitate to advise us of same.

Robert D. Gabriele
Deputy

RDG:mk
Enc.

cc. John Dekker, Director of Law
1302 North Gow
Wichita, Kansas

-4-

Fresno, Calif.

QUESTIONNAIRE FOR TESTIMONY BY NIMLO MEMBERS BEFORE
THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE
JUDICIARY COMMITTEE ON S. 584 AND S. 585 TO AMEND
42 U.S.C. SEC. 1983 ON MAY 6 AND 7, 1981.

1. Briefly describe the facts in any frivolous 1983 claims pending against the city; the amount of damages sought. Attach pleadings or motions you think will better inform the congressional readers of the hearings record. Explain the frustration of municipal defendants in getting frivolous claims dismissed.

1a. A City agency erroneously demolished a ramshackle commercial structure which had negative value. The property was worth more cleared off than with the structure. Prior to the demolition, the City and plaintiffs were trying to negotiate a resolution of the blighted building and the City had offered to demolish the building free of charge. Instead of alleging trespass or negligence, plaintiff is alleging civil rights violations.

(See attached sheet)

2. List any unusually large attorney's fees awards in relation to the amount of damages awarded against the city.

3. Briefly describe any cases in which the city prevailed and sought attorney's fees which were denied.

(See attached sheet.)

4. List the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claimed.

(See attached sheet.)

5. Indicate the kinds of cases nominally styled equitable or seeking injunctive relief which would result in monetary municipal liability without some sort of absolute, or qualified good faith, immunity in equitable/injunction cases.

1b. A recently filed federal action by a black male and female who were arrested for drunk and disorderly conduct in public. The enclosed complaint indicates that they filed an action based on claims of false arrest and excessive force. Neither one of them sustained any injuries of significance, (whether or not excessive force was used.) They also claimed conspiracy to violate their civil rights under Section 1983. They were the only two of 50 blacks at the scene of a criminal investigation (gambling raid) who were arrested. The female was released at the scene into the custody of her adult daughter within ten minutes of the arrest. There were seven nonblack officers at the scene, as follows: one merely drove the "paddy wagon," three officers were investigating eleven suspected "crap shooters," and three were maintaining crowd control (two of whom participated in making the arrests). However, all seven of the officers, plus the City of Fresno, were named as party defendants. Just before trial, City of Fresno was dismissed. During trial the trial judge granted motion to dismiss five of the seven officers because they could not be identified by plaintiffs as having anything to do whatsoever with the arrest other than the fact they happened to be within 100 feet of the arrests.

Frustration. All seven officers were very upset and experienced varying degrees of pessimism, not because they feared what they did was wrong but they feared placement of that judgment in the hands of six strangers who comprised the federal jury. This case hung over their heads for several years before justice finally prevailed when the final two heard the jury say, "Plaintiffs take nothing by this action."

3. In the case above referred involving the two black adults, the City sought costs of suit and attorney's fees. The Federal District Court Judge awarded costs of suit in the amount of $365.00. However, because the plaintiffs were on welfare and could obviously not recompense the City in the amount of $19,000 claimed as reasonable attorney's fees, the court refused to award attorney's fees. The court did, however, chastize the attorneys who brought the action to trial in stating, "No decent attorney would have ever tried this case, because it was obviously without merit."

4. In recent years two or three Section 1983 claims have been settled for between $500 and $1500, because the likely attorney's fees to outside counsel to try the case would have exceeded the "nuisance value."

EXHIBIT U-2

City Of Kalispell
Phone 406-755-5457 P.O. Box 1035 Kalispell, Montana 59901

May 4, 1981

John Dekker, President
NIMLO
1000 Connecticut Ave. N.W.
Suite 800
Washington, D.C. 20036

RE: Pending Civil Rights Damages

Dear Sir:

As per your letter of April 20, 1981, I forward herewith the Questionnaire.

I hope you get it in time to be of use to the Bates Committee.

Very truly yours,

Norbert Donahue

Norbert F. Donahue
City Attorney

NFD:lb

Enc.

Kalispell, Montana

QUESTIONNAIRE FOR TESTIMONY BY NIMLO MEMBERS BEFORE
THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE
JUDICIARY COMMITTEE ON S. 584 AND S. 585 TO AMEND
42 U.S.C. SEC. 1983 ON MAY 6 AND 7, 1981.

1. Briefly describe the facts in any frivolous 1983 claims pending against the city; the amount of damages sought. Attach pleadings or motions you think will better inform the congressional readers of the hearings record. Explain the frustration of municipal defendants in getting frivolous claims dismissed.

- None -

2. List any unusually large attorney's fees awards in relation to the amount of damages awarded against the city.

- None -

3. Briefly describe any cases in which the city prevailed and sought attorney's fees which were denied.

In a recent case against a police office only for alleged illegal arrest and brutality, the officer counterclaimed for physical damages. The officer prevailed and received a judgment for $6000.00 compensatory damages and $5000.00 punitive damages on his counterclaim.

4. List the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claimed.

Our city settled a case alleging improper application of a "theatre" license ordinance for $8500.00. The City had been defended by its insurance carrier on a "reservation of rights" and had we not settled we would have been exposed to the insurance company's attorney fees. We felt the case was frivolous in that we had a "good faith" defense for the officials named. Original action was for total of $1,900,000.00 in four counts.

5. Indicate the kinds of cases nominally styled equitable or seeking injunctive relief which would result in monetary municipal liability without some sort of absolute, or qualified good faith, immunity in equitable/injunction cases.

- None -

CITY OF KALISPELL, MONTANA

EXHIBIT U-3

OFFICE OF THE CORPORATION COUNSEL

CITY OF PEORIA

May 11, 1981

National Institute of Municipal Law Officers
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

RE: Legislation to Amend 42 U.S.C. 1983

Gentlemen:

I realize the attached response to your questionnaire dated April 20, 1981 is too late for inclusion i the Congressional hearings on 42 U.S.C. 1983. However, I am forwarding it to you for your file and possible future reference.

Yours very truly,

David L. Thomas

David L. Thomas
Corporation Counsel

DLT:js
Enclosure

City Hall Building
419 Fulton Street
Peoria, Illinois 61602
309/672-8520

2. There is presently pending civil rights litigation against certain City officers, County officers, and other County Personnel. While the statement which follows is somewhat lengthy, it is necessary to a complete understanding of this problem.

In 1970, there was an armed robbery in an outdoor theater located in rural Peoria County. The accused was chased from the scene of the robbery. The chase led into the City of Peoria where City police officers joined. In the course of the escape, the accused shot and fatally wounded a Peoria police sergeant. The chase, which lasted for a good time, was finally ended when the accused was corralled in the back yard of a resident of Peoria by officers and officers' canine corps. The accused was convicted of armed robbery and murder and sentenced to well over 100 years in the State penitentiary. 2 3/4 years later, the prisoner brought a civil rights action against various City police officers, County deputies, the County Sheriff, and the County prosecutor and prosecutorial staff. Charges against the City officers involved brutality in the course of arrest. The charge against County officials range from improper treatment during incarceration to violation of constitutional rights by the prosecutors in the course of the prosecution. After some two years of preliminary matters, the case against all parties was dismissed. The civil rights plaintiff then took an appeal. It should be noted at this time that the civil rights plaintiff was proceeding pro se. The plaintiff moved the Seventh Circuit Court of Appeals for an attorney to aid him in prosecuting his appeal. After some 8 months of filing briefs and other matters on the issue of appointed counsel, the Seventh Circuit denied the motion. Plaintiff's brief was then filed. The City of Peoria then filed its brief. Thereafter, the Seventh Circuit, on its own motion, appointed counsel for the civil rights plaintiff. A professor at the University of Notre Dame Law School and his staff were appointed. They filed a new brief; the City then was forced to file supplemental brief. The Seventh Circuit while affirming the dismissal as to the County prosecutor's staff, reversed as to City and County police officers and Sheriff. The ground upon which the Seventh Circuit reversed was that the trial court judge dismissed the complaint without exhaustively determining whether a trial on the merits could be held. The problem before the trial court in this case was that the plaintiff was residing in a penitentiary not in his district. After an exhaustive search for appointed counsel, no one would volunteer, so the Court did not appoint one. The plaintiff failed to seek a writ of habeas corpus for purposes of appearing at trial though he was fully aware of the procedures, having attempted to utilize the same mechanism for a pretrial hearing. Nonetheless, the Seventh Circuit held that adequate measures had not been taken to attempt to bring the matter to trial. The case was remanded to a different district court judge. There the case remained inactive for a period of nearly 2 years. The district court judge to whom the case was remanded then appointed Jenner & Block, a prestigious Chicago law firm, in this case. Discovery has now been had on all City of Peoria personnel. My good faith analysis of the case (now 11 years old) is that as to all but one of the City defendants, there is clearly no case whatsoever. As to one other, there may be a better case. Given the fact that there was no physical damage done to the civil rights plaintiff, further given that the officer in question immediately reported the incident to his superiors, given the fact that there was a high degree of emotion the evening of the arrest due to the death of a fellow officer, and given the fact that the one particular officer in question has been a model of propriety in the 11 years since, there would seem to be a very good case of a finding of either no liability or an award of nominal damages. However, it may become impossible to try the case because an award of nominal damages would result in at least a five-figure award of attorney's fees to Jenner & Block. Any counter motions for attorney's fees for failure to succeed against the other defendants appears to be fruitless for the reason that the defendant will have no money. Thus, it is my fear that the only party receiving any money in this case will be the plaintiff's attorney. To this end, many hours of defense time will have been given.

4. The only settlement of 1983 action authorized by this office was $4,000 in settlement of a procedural due process case.

The plaintiff, represented by Legal Aid, sought $10,000 in damages plus attorney's fees and costs. The $4,000 includes payment of damages, costs, and attorney's fees. In this case, the plaintiff clearly had a property right to continue the employment. The evidence was conflicting as to whether there was a sufficient pretermination notice of the discharge. The better evidence, however, seemed to be on the side of the governmental body and its employees. I was prepared to try the case until Owens v. Independence, Missouri came down four days before the trial. On the basis of that decision, I could not risk a trial and the case was settled.

EXHIBIT V

BOROUGH OF POMPTON LAKES
25 Lenox Avenue, Pompton Lakes, N.J. 07442 • (201) 835-0143

LAWRENCE T. ISENBERG
BOROUGH ATTORNEY

April 22, 1981

NIMLO
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

Gentlemen:

The following is a response to the questionnaire which you submitted by your letter of April 20th.

1. The Borough of Pompton Lakes has been involved in a limited number of actions involving Section 1983 or Section 1983 Type Claims. They are:

(a) FEINBLOOM vs. THE BOROUGH OF POMPTON LAKES, Superior Court of New Jersey, Passaic County, Law Division, Docket #L-8797-77. The action involved the rezoning of a parcel of land originally zoned for industrial use, to commercial recreation. Individual members of the governing body were named as Defendants, however, the case against the individual Defendants was dismissed by the Plaintiff when the Plaintiff was advised that the individual members of the governing body would have to pay their own defense and possibly personally pay any judgment. The Trial Court and the Appellet Division both determined that no violation of the Plaintiff's rights had occurred and that the zoning change was a valid action of the governing body, thus, the Court never reached the issue of damages. Copies of the Complaint, Answer, and Opinion are attached.

(b) HARRAKA vs. THE BOROUGH OF POMPTON LAKES, Superior Court of New Jersey, Law Division, Passaic County, Docket # L-19021-77, which involved the shooting by a

Police Officer of a knife-wielding assailant. The Complaint included claims against the Municipality for both compensatory and punitive damages, but, no claim for attorney's fees. The action against the Municipality for punitive damages was dismissed on my motion relying on the New Jersey Tort Claims Act. No claim was made for attorney's fees. The case was tried and the jury brought in a verdict for the Defendants determining, I assume, (a) that the Police Officers acted correctly, and (b) that they had received the proper training. Copies of the Complaint, Answer and Brief on the issue of Punitive Damages are attached.

2. None

3. See Number One Above

4. None

5. My opinion and experience: Every action by a Municipal Government in some way represents an interference with an individual right. The government constantly engages in weighing the public necessity of interfering with private rights. The Court of Equity is constantly faced with balancing the utility of conduct against magnitude of risk. Since government officials are not required to be wiser than their fellow citizens, but only more honest, it seems to me intolerable that they should be held responsible for good faith errors in order that the system may function. Likewise, if government is not immune, it also will soon cease to function. A recent case in point may explain the problem. Northern New Jersey is currently involved in a water crisis. The Governor of New Jersey has issued an edict ordering every Municipality to develop a water rationing plan and to enforce the Governor's program. Rationing, naturally, involves taking from one and giving to another. This Municipality's problem is further compounded by the fact that it has developed water resources far in excess of its current needs as a result of some fortuitous far-sighted planning. Nevertheless, it must now artificially ration its water supply and allow the unused

excess to be wasted. A rationing plan will undoubtedly hurt certain commercial and industrial users. Under the present status of the Section 1983 Claims, part of our plan is the anticipation of the law suits which undoubtedly will arise when the volume of water distributed to an industry causes economic damage, or the volume distributed to a residential user fails to provide for an adequate supply for, say, medical reasons, or fails to incorporate adequate hearing processes or some other Section 1983 Type Claim which is inventively pleaded in the future.

Very truly yours,

LAWRENCE T. ISENBERG
Borough Attorney

LTI/cs

Enclosures

EXHIBIT V-1

CITY
OF LONGVIEW
TEXAS

Box 1952 75606
214-757-6666

Mayor
T. T. CARLISLE

City Council
JAMES R. CURTIS, JR.
BOB MANESS
RON HUDGENS
JAMES E. JOHNSON
RONALD R. McCUTCHEON
TALFORD GRAHAM

City Manager
C. RAY JACKSON

April 30, 1981

National Institute of
Municipal Law Officers
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

Gentlemen:

Please find enclosed herewith our response to the questionnaire regarding civil rights lawsuits against municipalities.

Yours very truly,

Gary H. Shaver

GHS:pb

Enclosure

- Longview, Texas

QUESTIONNAIRE FOR TESTIMONY BY NIMLO MEMBERS BEFORE
THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE
JUDICIARY COMMITTEE ON S. 584 AND S. 585 TO AMEND
42 U.S.C. SEC. 1983 ON MAY 6 AND 7, 1981.

1. Briefly describe the facts in any frivolous 1983 claims pending against the city; the amount of damages sought. Attach pleadings or motions you think will better inform the congressional readers of the hearings record. Explain the frustration of municipal defendants in getting frivolous claims dismissed. The city fire department recently amended its promotional procedures so as to emphasize training, education, length of service, and time in grade. Prior to that time, the promotional system was unwritten and administered without any guidelines by the fire chief. Seniority was virtually the only factor considered in any promotion Suit was filed by certain firemen alleging that the new promotional system violated their property right of promotion based on the old promotional system. Damages in the amount of $20,000 are sought. See attached pleadings.

2. List any unusually large attorney's fees awards in relation to the amount of damages awarded against the city.

None

3. Briefly describe any cases in which the city prevailed and sought attorney's fees which were denied.

None

4. List the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claimed.

None

5. Indicate the kinds of cases nominally styled equitable or seeking injunctive relief which would result in monetary municipal liability without some sort of absolute, or qualified good faith, immunity in equitable/injunction cases.

EXHIBIT V-2

GORSUCH, KIRGIS, CAMPBELL, WALKER AND GROVER
ATTORNEYS AT LAW
1200 AMERICAN NATIONAL BANK BUILDING
818 SEVENTEENTH STREET
DENVER, COLORADO 80202
TELEPHONE 303/534-1200

LEONARD M. CAMPBELL
ROSCOE WALKER, JR.
CHARLES E. GROVER
JOHN L. FERGUSON
JAMES H. TURNER
WM. J. MCGEHEE
CHARLES E. RHYNE
JOHN S. PFEIFFER
RICHARD B. HARVEY
JOSEPH M. MONTANO
CHARLES W. MCDERMOTT
JOHN J. MULLINS, JR.
KENNETH G. CHRISTIANSSEN
DAVID R. GORSUCH
ROBERT E. WARREN, JR.
STEPHEN A. WEINSTEIN
ROBERT J. RAPELRE
FREDERICA G. JOLLEY
PHILIP E. RIEDESEL
JOHN J. RING, JR.
C. WILLING BROWNE
PAMELA M. MARTIN
DAVID M. POWELL
WILLIAM H. MCEWAN

STEPHEN KLEIN
JAMES A. JABLONSKI
MICHAEL J. WADLE
WILEY Y. DANIEL
EDWARD IMATANI
BARBARA S. BANKS
LAWRENCE R. TERRELL
SHAYNE M. MADSEN
CHARLES F. HEDGES, JR.
SANDRA E. MARTINEZ
REGINALD C. HAWKINS
RANDY D. FUNK
ROBERT E. MUSGRAVES
NORMAN L. RUGGLES
DAN S. CROSS
ANN E. DEVINE
BRUCE D. HAUSKNECHT
THOMAS M. JAMES
RONALD H. THOMPSON

OF COUNSEL
JOHN E. GORSUCH
FREDERIC L. KIRGIS

May 15, 1981

John Dekker
National Institute of Municipal
Law Officers (NIMLO)
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

RE: Request for information regarding civil rights lawsuits against municipalities.

Dear Mr. Dekker:

Enclosed please find answers to your questions regarding civil rights lawsuits against the City of Lakewood, Colorado. I hope this information will help you.

Very truly yours,

GORSUCH, KIRGIS, CAMPBELL,
WALKER AND GROVER

By: Martha Kennedy
Martha Kennedy, Administrative
Assistant to the Lakewood City
Attorney

:mk
Enclosure

1. Briefly describe the facts in any frivolous 1983 claims pending against the City. . .

Currently, there are three Section 1983 cases pending against the City of Lakewood. The facts of two cases (which are being tried together) are as follows:

Plaintiffs allege that the City of Lakewood violated various U.S. Constitutional provisions and statutes by discriminating against them because of their race and national origin. The complaints contain broad charges of discrimination, but essentially center on the failure of the City of Lakewood to promote these men to the rank of police sergeant. Each Plaintiff seeks remedies in the form of back pay, $464,000.00 ($928,160.00 total) for alleged losses incurred as mental distress and suffering, exemplary, compensatory and punitive damages. They also seek to secure the promotions which they feel were denied because of the City's discriminatory practices. The City of Lakewood has denied the allegations in toto.

The third case is not a racial discrimination suit, but rather involves Section 1983 somewhat more obliquely. Plaintiff's son was killed allegedly as a result of law enforcement activities undertaken by the City of Lakewood against two co-defendants in this action wherein the co-defendants, suspected of being part of a car-theft rign, were "hired" by police agents (undercover) to find a car. Plaintiff's claim that the City of Lakewood (and various other Defendants) deprived them of Plaintiff decedent's life without due process, thereby violating Section 1983.

The City of Lakewood contends that it cannot be held liable for the actions of the co-defendants, and that the suit is groundless and frivolous. Damages requested by Plaintiffs were set at $150,000.00 from each of the nine Defendants ($1,350,000.000) for:

1) Pecuniary losses of wages which decedent would have received during the course of his natural life.

2) Costs of burial and attendant expenses.

3) Loss in rights of companionship, love, support, etc. which decedent would have given his family.

In addition, Plaintiffs requested witness fees, attorneys fees, exemplary damages totalling $1,000,000.00 from each defendant.

To date, all claims for outrageous conduct on the part of Defendants have been dropped by the court, leaving only a Wrongful Death claim for which maximum damages under Colorado Statutes are limited to $45,000.00. The Wrongful Death Statute permits no punitive damages. The Court's action eliminates the exposure to the City, its agents, and employees. This matter has not yet gone to trial.

2. List any unusually large attorney's fees awards in relation to the amount of damages awarded against the City.

To date, this situation has not occured relative to the City of Lakewood.

3. Briefly describe any cases in which the City prevailed and sought attorney's fees which were denied.

To date, this situation has not occured relative to the City of Lakewood.

4. List the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past both in dollar amount, and expressed as a percentage of amounts originally claimed.

As of now, judgments have not been rendered in any of the above-described cases, and none have reached a settlement.

5. Indicate the kinds of cases nominally styled equitable or seeking injunctive relief which would result in monetary municipal liability without some sort of absolute, or qualified good faith, immunity in equitable/injunction cases.

Sex discrimination suits where harrassment is a major issue; racial discrimination actions relative to hiring or promoting policies of city departments; condemnation cases where the taking of property seems capricious to the property owner; any situation, in fact, where an individual feels he has been victimized. These situations are difficult to assess in terms of monetary damages because the alleged injuries and losses are not strictly pecuniary but rather subjective, emotional and invisible.

EXHIBIT V-3

COUNTY OF LOS ANGELES
OFFICE OF THE COUNTY COUNSEL
648 HALL OF ADMINISTRATION
LOS ANGELES, CALIFORNIA 90012

JOHN H. LARSON COUNTY COUNSEL

May 1, 1981 (213) 974-1819

National Institute of Municipal Law Officers
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

Re: Civil Rights Lawsuits Against Los Angeles County

Gentlemen:

Pursuant to your request of April 20, 1981, we submit the following in response to your questionnaire for testimony before the subcommittee on the Constitution of the Senate Judicial Committee on S. 584 and S. 585 to amend 42 U.S.C. 1983:

1. Frivolous civil rights claims. A large proportion of civil rights claims now pending in this office are ordinary tort cases which are frivolous in the sense that they are not well-founded either factually or legally. Many of these cases are brought because of spite or vindictiveness, or to harass public officers or employees. An example is the many actions brought by persons arrested against those who arrest them. We also have a substantial number of groundless cases brought by pro per plaintiffs, some of which are almost indecipherable. The total of these claims is many millions of dollars.

While we have suffered substantially no money judgments for damages against our clients in 1983 actions, they are time-consuming and expensive to defend, and their existence puts a heavy burden on an already heavily loaded staff.

2. Attorneys' fees awards. We have had two recent awards of attorneys' fees, one of $275,000 in a case challenging nearly all aspects of the administration of the County jail system, and the other $60,000 in an action seeking access to the courthouse by handicapped persons.

3. We have had no cases in which we sought attorneys' fees which were denied.

4. Civil rights judgments. All recent judgments against our clients were for attorneys' fees.

5. Cases seeking equitable or injunctive relief. By far the greatest exposure that our clients have to monetary expense comes from equitable or injunctive actions rather than money judgments for damages. We have a number of equitable actions seeking changes in the administration of the County jail system, the public welfare system and health care programs. By reason of the fact that these cases involve large number of recipients, and other persons, and the County could be required to provide benefits in perpetuity, the amounts involved are far in excess of the amounts sought by way of money damages.

We hope that this material will be of assistance to you in seeking enactment of S. 584 and S. 585.

Very truly yours,

JOHN H. LARSON
County Counsel

By: Robert C. Lynch
ROBERT C. LYNCH
Assistant Chief Deputy

RCL/gg

THIRD ATTACHMENT TO PREPARED STATEMENT OF BATES, CUTLER AND GLINK

SETTING THE DEPTHS OF THE MUNICIPAL POCKET:

A PROPOSAL FOR THE REEVALUATION OF MUNICIPAL LIABILITY UNDER SECTIONS 1983 AND 1988 AFTER MONELL, OWEN AND THIBOUTOT

By

Marvin J. Glink

and

Katherine S. Janega

of

Ancel, Glink, Diamond & Murphy, P.C.
Chicago, Illinois

PREFACE

On May 20, 1976, sixty-nine suburban Chicago municipalities attended an introductory conference seminar examining possible alternatives to traditional insurance. Annual increases in insurance rates during the period 1974-1976 had reached upwards of 400% to 500%. In certain areas of liability insurance, traditional markets were no longer available. As a result of that original meeting, sixteen communities under the auspices of the DuPage Mayors and Managers Conference and the Northwest Municipal Conference organized a Policy Committee. That Committee employed Risk Planning Group, Inc., of Darien, Connecticut, to assist in the analysis and evaluation of alternate self-insurance methods in the areas of property, automobile, general liability and workers compensation insurance.

As a result of a first and second phase report prepared by Risk Planning Group, Inc., the Study Group members, which had grown to a list of twenty-one, chose to explore the development of an intergovernmental entity to provide pooled self-insurance coverage supplemented by purchased excess insurance. Upon the recommendation of Risk Planning Group, Inc., our law firm was employed to serve as legal advisor and Arthur J. Gallagher & Company was employed to serve as insurance advisor. The group also received a planning grant from the Illinois Department of Local Government Affairs. Reports were prepared which showed that a self-insurance entity was legally and practically possible. Documents setting up such an entity were drafted. The corporate authorities of fourteen of the twenty-one study members voted to become charter members of the Intergovernmental Risk Management Agency (IRMA). IRMA began its legal existence on January 1, 1979. Membership has grown to twenty-two municipalities and nine new municipalities will become members on January 1, 1981.

The basic objectives of IRMA were:

(1) A reduction in claims due to an active loss reduction program,

(2) Greater interest in loss reduction due to direct accountability of the members of the Agency along with frequent and detailed loss reports,

(3) Exceptional security for the members of the Agency and their employees, and

(4) A hoped-for savings to the public in reduced claims and administrative costs.

For the first year of the program, IRMA has had 1,379 claims of all types presented, disposing of 1,276, with payments to date of $530,000. The first $1,000 of every claim is paid by the individual member and the IRMA pool pays the remainder of each claim up to $250,000. Beyond $250,000, excess insurance is purchased, up to $5,000,000.

Between January 1, 1980 and September 30, 1980, IRMA received 1,329 claims and has closed 922 claims, paying to date $340,000. Only one case so far has qualified as an excess loss matter.

IRMA estimates that it has saved approximately $600,000 over conventional insurance during its first year and that it expects it will save in excess of $700,000 for the year ending December 31, 1980. For 1981, IRMA is projecting savings of over $2,000,000 for thirty-one communities.

IRMA's full time risk manager, Edward D. Hansen, has now secured grant funds and budget funds for extensive legal training programs for all types of municipal employees. These programs will be presented in 1981.

In addition to IRMA, a new intergovernmental agency has been formed, which we also represent, called STARM. These twenty-one communities are starting their program of self-insurance for workers compensation only, but expect to go to full liability protection in the near future.

IRMA, we believe, is the largest self-insurance association of municipalities in the United States. Its 1981 funding by its members will be approximately $4,000,000. While all types of claims against a municipality are being defended, we presently have approximately twenty claims or lawsuits alleging a civil rights cause of action. These claims arise from a variety of incidents including zoning decisions, obscenity ordinance enforcement, discharge of municipal employees, police law enforcement, and alleged discrimination against Hispanics. We predict, for the reasons set forth in this article, that there will be a dramatic increase in this type of litigation in the near future, and that in addition to the high costs of defense a municipal crisis will develop over finding sufficient funds to pay losses, judgments and attorneys fees. While the effects of civil rights exposure will also severely affect the private insurance industry, the impact on municipal self-insurance programs will cause serious erosion on the projected savings of tax dollars.

I. INTRODUCTION

Few developments in the area of civil rights litigation have struck municipalities with the force of three recent cases decided by the United States Supreme Court. Between June, 1978, and June, 1980, the Court's decisions in Monell v. New York City Department of Social Services,[1] Owen v. City of Independence,[2] and Maine v. Thiboutot,[3] marked the end of local governmental immunity to suits brought under Section 1983 of Title 42 of the United States Code,[4] withdrew the availability to local governments of a good faith defense to Section 1983 claims[5] and recognized Section 1983 claims based on purely statutory violations of federal law.[6] At the same time that they have been subjected to an ever-increasing number of Section 1983 actions generated by Monell, Owen and Thiboutot, municipalities have also been required to pay the attorneys' fees of successful Section 1983 plaintiffs in accordance with the Civil Rights Attorney's Fees Award Act of 1976 (hereafter referred to as "Attorney's Fees Act").[7]

In the wake of the Attorneys' Fees Act and Monell, Owen and Thiboutot, the kinds of conduct for which a local governmental entity may be subjected to civil rights liability have become more varied while the number of available defenses has diminished.[8] As a result, local governments are being forced to bear a threefold financial burden by defending against civil rights claims, paying monetary judgment awards and paying plaintiffs' attorneys' fees. This vastly expanded governmental liability under Sections 1983 and 1988 appears to extend beyond the contemplation, if not the very goals, of the civil rights remedy originally adopted by the Forty-second Congress. It also appears to be based on a deep pocket theory that does not necessarily withstand an examination of the financial status of today's municipalities. The impact of these developments is thus cause for serious concern, for, in light of the Supreme Court's pronouncements, municipal civil rights liability can only be expected to continue to grow unless the Congress intervenes.

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[1] 436 U.S. 658 (1978)
[2] 100 S.Ct. 1398 (1980)
[3] 48 U.S.L.W. 4859 (June 24, 1980)
[4] 436 U.S. 658 (1978)
[5] 100 S.Ct. 1398 (1980)
[6] 48 U.S.L.W. 4859 (June 24, 1980)
[7] Pub. L. 94-559, §2, Oct. 19, 1976, 90 Stat. 2641 [amending 42 U.S.C. §1988 (1975)].

It is the purpose of this article to demonstrate the need for a Congressional reevaluation of municipal liability under Sections 1983 and 1988, and to recommend legislative changes that will further the intentions of their original framers to provide realistic remedies for constitutional violations while preventing what now seems an inevitable, though gradual, paralysis of municipalities due to the fear and expense of civil rights litigation. The basis for the proposed amendments to Sections 1983 and 1988 will be an examination of the development of the civil rights liability of local governments and a projection of the future course of that liability under the Attorneys' Fees Act and the holdings of Monell, Owen and Thiboutot.

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[8] These matters will be discussed at greater length in the following sections of this article.

II. LIABILITY OF MUNICIPALITIES UNDER SECTION 1983

A. Section 1983 Civil Rights Litigation Before *Monell.*

Section 1983 was enacted as part of the Civil Rights Act of 1871 and has stood virtually unchanged since that time.[9] Amended in 1979,[10] Section 1983 now provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Although Section 1983 was a product of the post-Civil War reconstruction efforts to provide powerful federal remedies for constitutional violations suffered under State law,[11] it generated few successful actions and so was put to little use prior to the Supreme Court's decision in *Monroe v. Pape.*[12] The lack of effectiveness of Section 1983 has been attributed to the strict construction of Section 1983 adopted by the courts while overlooking the legislative intent behind the statute.[13]

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[9] The Civil Rights Act of 1871, Ch.22, 17 Stat. 13, Section 1, as originally enacted, provided:

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress....

Section 1 was codified in 1874 as Rev.Stat. §1979, changing the language, without comment to read:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[10] Pub. L. 96-170, §1, Dec. 29, 1979, 93 Stat. 1284, added references to the District of Columbia and provisions relating to Acts of Congress solely applicable to the District of Columbia. These amendments effected no change in the actual scope of liability under Section 1983.

In *Monroe v. Pape,* the Supreme Court was faced with an extreme factual situation in which thirteen Chicago police officers broke into the Monroe home early in the morning, awakened them and made them stand naked in the living room while the police went on to tear through every room, emptying drawers and ripping mattress covers. Monroe was taken to the police station and held for ten hours without being charged or brought before a magistrate, during which time he was questioned about a two-day-old murder and was not allowed to call his family or his attorney. No charges were brought against him, and he was later released.[14] Monroe attempted to assert claims against the police officers and the City of Chicago under Section 1983, but the District Court dismissed the complaint as to all defendants. The Court of Appeals for the Seventh Circuit affirmed and the Supreme Court subsequently granted Monroe's petition for writ of certiorari.[15]

In delivering the opinion of the court, Justice Douglas delved into the legislative history of the Civil Rights Act of 1871 in considering whether Congress intended to afford a remedy to persons for the deprivation of a constitutional right, privilege or immunity resulting from an official's abuse of his position, and whether the city was a "person" and could therefore be subjected to liability under Section 1983.

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[11] Note, *Municipal Liability Under Section 1983: The Meaning of "Policy or Custom."* 79 Col.L.Rev. 304, 307.

[12] 365 U.S. 167 (1961).

[13] *Civil Rights Cases,* 109 U.S. 3, 26 (1883), (Harlan, J., dissenting). See also Gressman, *The Unhappy History of Civil Rights Legislation,* 50 Mich.L.Rev. 1323 (1952).

[14] Monroe v. Pape, 365 U.S. 167, 169 (1961).

[15] 362 U.S. 9[illegible] (1960).

The Court rejected several long-standing arguments in adopting the definition of "under color of" law it had earlier pronounced in United States v. Classic[16] and reaffirmed in Screws v. United States[17] and Williams v. United States.[18] Defining the phrase as it had appeared in Section 20 of the Criminal Code,[19] the Court in Classic had stated:

> Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.[20]

The resort to the legislative history of the Civil Rights Act of 1871 in extending to Section 1983 the definition of "under color of" law as interpreted in the Criminal Code, laid to rest an argument that had proven to be a previously insurmountable barrier in bringing a civil rights claim against individual officials. That argument maintained, as the police officers had unsuccessfully attempted to argue in Monroe, that the acts complained of were not authorized by state law, custom or usage, and were, therefore, not "under color of" state law.[21] By defining acts under the color of state law as acts that are done under the mantle of authority rather than as acts done with express authority, the Court thus revived Section 1983 as a tool to be used to secure a remedy for the actions of individual persons.

Section 1983 actions were given a further boost by the Court's rejection of the argument that a claim under Section 1983 was barred because unreasonable searches and seizures were outlawed by the state's Constitution and laws:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter

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16. 313 U.S. 299 (1941).
17. 325 U.S. 91 (1945).
18. 341 U.S. 97 (1951).
19. 18 U.S.C. §242 (1940).
20. 313 U.S. at 326.
21. Monroe v. Pape, 365 U.S. at 172.

> need not be first sought and refused before the federal one is invoked.[22]

Justice Douglas went further into the debates surrounding the passage of the Civil Rights Act of 1871 in determining whether the city could also be sued under Section 1983. Relying on the rejection of the Amendment to Section 2 of the Civil Rights Act proposed by Senator Sherman, the Court concluded that the Forty-second Congress could not have intended to include municipalities within the scope of the Civil Rights Act. The Sherman Amendment would have imposed strict liability on towns and counties for any constitutional deprivations occurring within them. Although the amendment passed the Senate, it was rejected by the House of Representatives which questioned the power of Congress to impose such liability on municipalities.[23] That action on the Sherman Amendment prompted Justice Douglas to state:

> The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word "person" was used in this particular Act to include them.[24]

Thus, while Monroe advanced the course of civil rights claims under Section 1983 by clearly defining what actions were "under color of" law, it still left the protection of absolute immunity to municipalities in actions for damages. The Monroe Court's reasoning was adopted more than ten years later in City of Kenosha, Wisconsin v. Bruno,[25] in which Justice Rehnquist announced the Court's decision that the immunity afforded municipalities to actions for damages under Section 1983 also included immunity to Section 1983 actions for equitable relief.[26]

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[22] *Id.* at 183.

[23] *Id.* at 190.

[24] *Id.* at 191.

[25] 412 U.S. 507 (1973).

[26] Justice Douglas disagreed with the *Kenosha* Court's extension of the legislative history he followed in Monroe. In the Appendix to his dissent in *Kenosha,* Justice Douglas expressed his opinion that the Sherman Amendment was rejected because of its proposed strict liability and the fear that civil liability for damages might "destroy or paralyze local governments" and that the rejection of the Sherman Amendment therefore did not necessarily defeat the existence of actions in equity against municipalities. 412 U.S. at 517-520.

The absolute immunity of municipalities from Section 1983 liability remained intact until the Supreme Court's decision in Monell v. New York City Department of Social Services.[27.]

B. *Monell* and the End of Absolute Immunity for Municipalities.

In Monell v. Department of Social Services of the City of New York, the Supreme Court partially overruled Monroe[28] and held that municipalities are "persons" subject to liability under the Civil Rights Act of 1871. Nevertheless, although the Court's conclusion marked a dramatic change in the course of civil rights litigation under Section 1983, the Court was careful to limit its holding to the facts and issues that had been presented and to leave such questions as defining the scope of municipal liability to be decided in other contexts.[29]

The action in Monell was brought by a class of female employees of New York's Department of Social Services and Board of Education who alleged the existence of a citywide policy which provided for a compulsory, unpaid maternity leave after the fifth month of pregnancy, even if such leave was not necessary for medical reasons. The plaintiffs sought both injunctive relief and damages, naming the Department of Social Services and its commissioner, the Board of Education and its chancellor, and the City of New York and its mayor as defendants. Cross-motions were filed, and the District Court held that the action for equitable relief

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[27.] 436 U.S. 658 (1978).

[28.] Only that portion of the *Monroe* ruling finding municipalities absolutely immune to Section 1983 actions was overturned. The Court let stand its earlier definition of "under color of" law and affirmed that portion of *Monroe* that rejected the doctrine of *respondeat superior* as a basis for municipal liability under Section 1983.

[29.] Indeed, the Court's hesitation to state a broader rule may well have been precipitated by a realization that *Monroe* had been permitted to stand for a principle broader than its facts allowed and beyond what had been briefed and argued to the Court, a fact stated in Justice Powell's concurring opinion. 436 U.S. at 709 (Powell, J., concurring.)

had been rendered moot by a change in policy effected after the filing of the complaint. Turning to the claim for back pay, the court found that the acts complained of were unconstitutional, but nevertheless denied the plaintiffs damages because any judgments against the individual defendants would have to be satisfied by the City of New York, which was immune from suit under Monroe. The Court of Appeals for the Second Circuit affirmed, finding that the individual defendants, while sued in their official capacities, were nonetheless "persons" answerable to suit under Section 1983, but refusing to allow the damage action to proceed against them for the same reason cited by the District Court.

The question which reached the Supreme Court raised the issue of the status of local governmental officials and local school boards as persons under Section 1983 when a claim for back pay is brought against them in their official capacity.[30] Noting a line of cases in which school boards were named defendants and jurisdiction was based on Section 1983 and its jurisdictional counterpart, 28 U.S.C. §1343,[31] the Court announced the overruling of Monroe insofar as it held local governments totally immune from Section 1983 actions.

The Court's analysis of Section 1983 began by retracing the historical territory covered by the Monroe court, and then went on to consider the debate surrounding the passage of Section 1 of the Civil Rights Act itself. The Court initially pointed out that the Sherman Amendment was not an amendment to Section 1 of the Civil Rights Act and that Section 1 was not even mentioned in the debates on the Amendment.[32] Further noting its disagreement with the Monroe Court's reading of the debate on the Sherman Amendment, the Court concluded that the rejection of the Amendment was not grounded in the belief that Congress was barred from imposing liability on municipalities, notwithstanding the fact that municipalities are creatures of the various States.[33]

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[30] The Court of Appeals had also held that the Board of Education was not a "person" under Section 1983. 436 U.S. at 662.

[31] *Id.* at 663 n.5.

[32] *Id.* at 664.

The Court referred to the words of Representative Shellabarger, the sponsor of the Amendment in the House, who spoke of the entitlement of citizens to governmental protection of their fundamental privileges and cited, in support of this argument, examples of federal statutes creating liabilities as a means of enforcing constitutional provisions. While noting that many members of the House who opposed the Amendment objected to it on the grounds that the Amendment unconstitutionally created the duty to keep the peace rather than enforcing a duty which existed under State law, the Court stopped short of concluding that the Amendment was rejected by the House solely for that reason, in part because most of the Congress did not speak to the issue of constitutionality at all.[34] Nevertheless, the Court was apparently sufficiently reassured by two other considerations to conclude that the Sherman Amendment was rejected by the House substantially because of the belief that Congress was not empowered by the Constitution to impose a duty on municipalities where no such duty had been imposed by the State. First, the Court had quoted Representative Blair's analysis of the constitutional question and considered Blair's analysis to be "precisely" the analysis of Representative Poland, whose comments had been quoted as authoritative by the Monroe Court. In addition, according to the Monell Court, Blair's analysis was supported by the precedent of that day and no other approach to the issue of constitutionality had been urged in the House debates.[35]

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[33] *Id.* at 672-73.
[34] *Id.*
[35] *Id.* at 676.

Thus, the Court found that the rejection of the Sherman Amendment had been based on the belief that, since Congress could not directly impose upon municipalities a duty to keep the peace, the Congressional creation of a strict liability for a breach of the peace was also unconstitutional as an indirect imposition of the same duty. It reasoned further that if Section 1 of the Civil Rights Act of 1871 had the same effect as the Sherman Amendment, creating a liability for a duty the Congress could not impose, then municipalities could not be considered "persons" within the meaning of Section 1983.[36]

The Court readily concluded that Section 1 of the Civil Rights Act caused no such constitutional problem. Still relying on the House debates on the Sherman Amendment, the Court indicated that the opponents to the Amendment recognized that Congress could confer jurisdiction on the federal courts to hear matters arising out of a municipality's duties under the laws of its parent State and that Congress could grant to the federal courts the power to enforce the Constitution against municipalities that had violated it.[37]

Turning next to a reading of the debates on Section 1 of the Civil Rights Act, the Court, in conjunction with the rules of statutory construction, completed its analysis of the legislative history of Section 1983, stating that Congress had intended a broad remedy for violations of federally protected rights and inferred that municipalities were as capable of causing the harm Section 1 of the Civil Rights Act was intended to remedy.[38]

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36. *Id.*

37. *Id.* at 679-82. The Court added, rather weakly, that the very fact that the opponents of the Sherman Amendment voted in favor of Section 1 of the Civil Rights Act confirmed the difference in liability between the two provisions. While the Court's statement does little to support the conclusion that Section 1983 was intended to include municipalities as persons, it does underscore the Court's basic premise that the debate on the Sherman Amendment does not definitively disclose the intention to grant absolute immunity to municipalities.

38. *Id.* at 685-86.

Furthermore, the Court quoted a statement of Representative Bingham, explaining that he had drafted Section 1 of the Fourteenth Amendment with the case of Barron v. Mayor of Baltimore[39] in mind, in which a city had taken property for public use without compensating the owner, but that the owner had no remedy against the city. As the Court read Bingham's remarks, Section 1 of the Civil Rights Act would afford a remedy for such a taking, thus confirming that municipalities were included as persons in Section 1983.[40] Finally, the Court emphasized that it was well established that municipal corporations were routinely sued in federal courts at that time, and that the Dictionary Act,[41] passed shortly before the Civil Rights Act, included "bodies politic and corporate," and hence municipalities, within the meaning of "person."[42]

Having thus decided that municipalities are "persons" within the meaning of Section 1983 and were, therefore, not immune to civil rights actions under that statute, the court continued to examine Section 1983 in the light of its history in order to define the extent of municipal liability and concluded:

> [T]hat a local government may not be sued for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983.... [W]e have no occasion to address, and do not address, what the full contours of municipal liability under §1983 may be. We have attempted only to sketch so much of the §1983 cause of action against a local government as is apparent from the history of the 1871 Act and our prior cases and we expressly leave further development of this action to another day."[43]

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[39] 7 Pet. 243 (1833).
[40] Monell, 436 U.S. at 686-87.
[41] Act of Feb. 25, 1871, §2, 16 Stat. 431.
[42] Monell, 436 U.S. at 688-89.
[43] *Id.* at 694-95.

In its narrowest form, the Monell holding is merely that municipalities no longer enjoy absolute immunity to suit under Section 1983, whether the action be for damages or for equitable relief.[44] Nevertheless, the problem of defining "custom or policy" under Monell continues to pose questions for the lower courts.[45] Moreover, although rejecting respondeat superior as a basis for municipal liability, Monell left the matter of vicarious liability open for consideration in leaving open the question of whether local governments should be afforded some immunity from suit under Section 1983.[46] Ironically, the Court's own choice of words in expressing its restraint from defining "the scope of any municipal liability" may well have been a portent of things to come, for its simple statement, "lest our decision [in Monell] 'be drained of meaning,'" would indicate a tendency away from immunity.[47] At any rate, the day for the Court to express its views on that issue came quickly, with the granting of certiorari in Owen v. City of Independence, Missouri.[48]

C. *Owen* and the Beginning of Strict Liability.

With Owen v. City of Independence, the Supreme Court took the opportunity to consider the scope of municipal liability under Section 1983 and, with its decision in Monell providing the impetus, ruled that the Forty-second Congress did not contemplate the grant of any immunity, either absolute or qualified, to municipalities in the face of claims brought against them under

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[44] The Court acknowledged that its ruling was a departure from the principle of *stare decisis* in that it overruled the prior holdings of municipal immunity announced in *Monroe* and *City of Kenosha v. Bruno,* 412 U.S. 507 (1973), but countered by saying that *Monroe* and *Kenosha* were the real departures from prior practice and that *stare decisis* therefore would not operate as a bar to their being overturned. Monell, 436 U.S. at 695-701.

[45] Note, *Municipal Liability Under Section 1983: The Meaning of "Policy or Custom,"* 79 Col. L.Rev. 304 (1979).

[46] This is not to imply that the Court should have set the limits of liability, for such an attempt would have been unwarranted by the facts of the case.

[47] Monell, 436 U.S. at 701.

[48] 100 S.Ct. 1398, (1980).

Section 1983. Having thus disposed of the good faith defense it had left to municipalities in Monell, the Court in effect held that Section 1983 imposed strict liability upon municipalities for constitutional violations.

The Court's decision is troubling for several reasons. First, the factual setting of Owen does not seem to warrant such a broad ruling. Second, the Court's analysis could have just as easily led it to sustain good faith immunity, for, as the Court's discussion in Monell had disclosed, the legislative history of Section 1983 is not conclusive[49] and the Court's rationale for rejecting existing theories of good faith immunity tends to disregard the fact that the only way municipalities can act is through their officers and employees. Finally, although the Court does not specifically address the questions of whether the expanded liability of municipalities is retroactive and whether municipalities may be found vicariously liable for the acts of their employees, it appears from its opinion that the Court has answered both questions affirmatively.

The suit in Owen was precipitated by the dismissal of the chief of police of the City of Independence following a meeting at which the City Council had decided to turn over to the prosecutor's office and to release to the news media several investigative reports disclosing some questionable practices in the police department. The Council also agreed that the City Manager should "'take all direct and appropriate action' against those persons 'involved in illegal, wrongful or gross inefficient activity brought out in the investigative reports.'"[50]

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[49] 436 U.S. at 669-694.

[50] Owen, 100 S.Ct. at 1404.

Owen had been chief of police for five years when he and a new City Manager became involved in a dispute over the way Owen handled the administration of the police department's property room. The City Manager directed Owen to conduct an investigation of the department after a gun which property room records showed as destroyed had been found in the possession of a felon in Kansas City. Shortly after the City Manager had ordered the investigation, he transferred responsibility for it from Owen's department to the Department of Law, where it was supervised by the city's attorney. The city attorney submitted a written report and copies of confidential witness statements in which he concluded that no criminal acts or other violations of the state's or municipality's laws had occurred in operating the property room although the city's auditor found there was not enough information in the records to allow an audit. The results of the investigation were reported to the City Council in an informal meeting and the City Manager said he would take action "at an appropriate time" to resolve any problems in the police department.[51]

Shortly thereafter, the City Manager asked Owen to resign as police chief and take a different position in the department. The City Manager pointed out the dissatisfaction with the way Owen ran the department, citing in particular the insufficient supervision of the property room and warned Owen that he would be dismissed if he did not resign, but Owen refused to resign. Three days later, the City Manager issued a public statement, addressed to the Mayor and the City Council, reporting on the investigation, concluding that there appeared to be no evidence to support criminal charges and advising the Mayor and City

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[51] *Id.*, at 1402-03.

Council that administrative actions were being taken to resolve the "discrepancies" in the handling of the property section.[52]

The City Manager took no formal action against Owen before leaving for a brief vacation. While the City Manager was gone over the weekend, Owen sent him a letter demanding written notice of the charges against him and a public hearing on those charges. Owen had sent the letter after consulting with his lawyers, and apparently agreed that the City Manager had the authority to relieve him of his duties.[53] Meanwhile, City Councilman Roberts requested a copy of the report prepared by the city attorney and the acting City Manager sent him a copy of the audit report and witness statements.

On Monday evening, at the City Council's regular meeting, Councilman Roberts read a prepared statement on the investigation, alleging "that petitioner had misappropriated police department property for his own use, that narcotics and money had 'mysteriously disappeared' from his office, that traffic tickets had been manipulated, that high ranking police officials had made 'inappropriate' requests affecting the police court, and that 'things have occurred causing the unusual release of felons.'"[54] Councilman Roberts' motion that the reports be released publicly and presented to the grand jury was passed and Owen was discharged the following day by the City Manager.

Owen received a written notice of his dismissal, but the reason for his dismissal was not disclosed. His earlier request for a hearing was ignored and his requests for a review of his dismissal was denied on the ground that there was no procedure for such a review. The local press linked the discharge to the investigation and gave the story prominent coverage. The release of the audit and investigation were never released to the public but were presented to the grand jury. The grand jury did not indict Owen and no further action was taken by the City.

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[52] *Id.* at 1403.
[53] *Id.* at 1403, n. 4.
[54] *Id.* at 1403-04.

Owen's complaint alleged violation of substantive and procedural due process rights because of his dismissal without notice or hearing and sought declaratory and injunctive relief, including a hearing, back pay from the date of his dismissal and attorney's fees. The district court held a bench trial and entered judgment for the City, the City Manager and the Council members, who had been sued in their official capacity.[55] The district court found that Owen was an untenured employee and therefore did not have a protectable property interest in his position and that there was no deprivation of liberty because no stigma was placed on Owen's professional reputation. The district court based its conclusion on the fact that the discharge notice stated that Owen was being dismissed under the provision granting the City Manager the authority to appoint and remove administrative officers and employees at his discretion, that the City Manager had apparently decided to hire a new police chief before the Council ever acted and that Owen had been "completely exonerated" from any charges of illegal or immoral conduct by the city attorney's report, the City Manager's public statement and the grand jury's subsequent action.[56] The district court also found that the City had established its good faith and thus was entitled to a qualified immunity to the suit.[57]

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[55] Owen v. City of Independence, Missouri, 421 F. Supp. 1110 (W.D. Mo. 1926.).
[56] *Id.* at 1121-22.
[57] *Id.* at 1123.

The Eighth Circuit Court of Appeals initially reversed on the grounds that the public accusations against Owen had tarnished his name and reputation and he was thus deprived of liberty without due process of law.[58] The defendants petitioned the Supreme Court for review of the Court of Appeal's decision. The Supreme Court granted certiorari and remanded the case for reconsideration in light of Monell. On remand, the Court of Appeals reaffirmed its original decision but held that all of the defendants were entitled to a qualified immunity, because the cases of Board of Regents v. Roth[59] and Perry v. Sindermann,[60] clarifying the entitlement to a name-clearing hearing for government employees allegedly stigmatized by the circumstances of their dismissal, were decided two months after Owen was discharged and the defendants could not have known that they were violating Owen's rights.[61]

Noting the division of the Courts of Appeals on the question of qualified immunity for local governments based on the good faith of their officials,[62] the Supreme Court agreed to review the case and returned to the exegesis it began in Monell. Turning first to the language of Section 1983, the Court found it to be "absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted,"[63] and reiterated the conclusion stated in Monell that Section 1983 was intended to provide a "broad remedy for violations of federally protected rights."[64]

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[58] Owen v. City of Independence. Missouri, 560 F.2d 925 (8tn Cir. 1977).

[59] 408 U.S. 564 (1972).

[60] 408 U.S. 593 (1972).

[61] Owen v. City of Independence, Missouri, 589 F.2d 335, 338 (8th. Cir. 1978).

[62] Owen, 100 S.Ct. at 1407 n.15.

[63] *Id.* at 1407.

[64] *Id.* at 1408.

The Court nevertheless acknowledged the existence of immunities firmly rooted in the common law which Congress would have had to abolish specifically and the Court thus considers to be incorporated within Section 1983. These immunities include the absolute immunity of legislators,[65] judges[66] and state prosecutors, in preparing and presenting a case,[67] and the good faith immunity of police officers,[68] prison officials and officers,[69] the superintendent of a state hospital,[70] local school board members,[71] and the governor and other executive officers of the state for discretionary acts done in the course of their official conduct.[72]

The Court pointed out that at the time of the passage of the Civil Rights Act of 1871 it was well-established that municipalities were treated as natural persons under the law and were regularly held to be liable for statutory and constitutional violations, breach of contract and tort damages.[73] The Court added that, although the Forty-second Congress recognized that tort liability for municipalities was common, it found no suggestion in the debates on the Civil Rights Act that a municipality would be excused from liability if its agents acted in good faith.[74]

The Court nevertheless referred to two theories of a limited protection from tort liability, only to find neither of them applicable. In the first, the functions of a municipality are classified as "governmental" or "proprietary," governmental functions affording immunity while proprietary functions subjected a municipality to liability as if it were a private corporation.[75]

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[65] Tenney v. Brandhove, 341 U.S. 367 (1951).
[66] Pierson v. Ray, 386 U.S. 547 (1967).
[67] Imbler v. Pachtmen, 424 U.S. 409 (1976).
[68] Pierson v. Ray, 386 U.S. 547 (1967).
[69] Procunier v. Navarette, 434 U.S. 555 (1978).
[70] O'Connor v. Donaldson, 422 U.S. 563 (1975).
[71] Wood v. Strickland, 420 U.S. 308 (1975).
[72] Scheuer v. Rhodes, 416 U.S. 232 (1974).
[73] Owen, 100 S.Ct. at 1409-10.
[74] *Id.* at 1411.
[75] *Id.* at 1412.

The second theory similarly classifies the actions of municipalities, granting an absolute immunity for "discretionary" or "legislative" activities, but allowing no immunity for "ministerial" acts.[76] Finding the governmental-proprietary distinction to be rooted in sovereign immunity, and the absolute immunity for governmental functions subject to removal by the sovereign, the Court concluded that the enactment of Section 1983, which included municipalities as persons, abrogated any immunity to suit that the municipalities may have had.[77] On the other hand, immunity for "discretionary" acts was founded on the theory of separation of powers, to prevent judicial reevaluation of the municipality's judgment, but, the Court reasoned, municipalities have no discretion to violate the Constitution.[78]

The Court went on to say that public policy considerations militate against a good faith immunity, stating that Section 1983 was intended "not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well."[79] Citing the rationale for official immunity defined in Scheuer v. Rhodes,[80] the Court found them to be "less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue."[81] Where the money comes from the public treasury rather than an individual's pocket, according to the Owen Court, it is less likely that the official's ability to effectively and decisively perform in office will be dampened and the injustice of subjecting an individual to liability for damages, especially in the absence of bad faith, is "simply not implicated."[82]

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[76] *Id.*
[77] *Id.* at 1413-14.
[78] *Id.* at 1414-15.
[79] *Id.* at 1416.
[80] 416 U.S. at 240.
[81] 100 S. Ct. at 1416.
[82] *Id.* at 1417.

Perhaps the key to the Court's reasoning, and thereby the source of its weaknesses, is in the Court's characterization of the question as one of degree of immunity as opposed to a question of available defenses. As the Court rightly pointed out in its discussion of the "governmental" and "discretionary" immunities, the question of good faith does not apply in either instance because the immunity is either absolute or nonexistent.[83] Consequently, the use of either theory as the basis for the rejection of a qualified immunity resting on the good faith of the municipal officials is questionable, for the determination of amenability to suit does not necessarily define the scope of liability. This was clearly evidenced in Monell, where the Court would not allow itself to go beyond the basic question of whether or not the local governmental entity could be sued under Section 1983.[84]

For the same reason, the resort to Section 1983's legislative history is equally misplaced. As the Owen Court points out, there is no mention of a qualified immunity in the debates.[85] Indeed, the debates themselves, as the Monell Court indicated, were rather sketchy[86] and were confined more to defining who was to be subjected to liability, and for what acts, rather than to carving out defenses. Furthermore, it was the creation of an absolute duty which the Monell Court believed the House of Representatives considered repugnant in the Sherman Amendment.[87]

A central idea in the Court's opinion is that Section 1983 was intended to have a broad sweep, subjecting municipalities to the same liability as individuals and corporations,[88] that its language is "absolute and unqualified," making no mention of "any privileges, immunities or defenses that may be asserted."[89] The existence of "privileges, immunities and defenses" for individuals are accepted by the Court, the absence of mention in Section 1983 notwithstanding. If an individual may defend against liability through good faith, then perhaps such a defense should also be available to municipalities as "persons" under Section 1983. The Court indicates that there are two reasons that allow individuals good faith immunity: their inability to pay, as opposed to the availability of funds in the municipal treasury, and the need to prevent the individual governmental officials from becoming ineffective and indecisive in performing their duties, due to a fear of personal liability. Contrary to what the Court believes, however, these two principles are, or should be, applicable to municipalities as well.

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[83] *Id.* at 1413-15.
[84] Monell, 436 U.S. at 661 n. 1.
[85] Owen, 100 S.Ct. at 1411.
[86] Monell, 436 U.S. at 669.
[87] *Id.*

In the first place, municipalities are not uniformly blessed with the deep pockets the Court seems to accept as fact. While it is true that a municipality is much more likely than one of its employees to be able to absorb the cost of a Section 1983 judgment against it, its financial resources are not unlimited, and subjecting the municipality to strict liability can lead to fiscal problems, especially in municipalities that are already suffering from inadequate financial resources. Secondly, the Court does not give serious consideration to the fact that a municipality acts through its employees. If a municipality is to be subjected to strict liability and may not avail itself of a good faith defense, it is just as likely to suffer the inhibiting effect as an employee subjected to personal liability, the difference being that where an official or employee is subjected to personal liability the indecisiveness will start with the individuals, whereas the indecision on the part of the municipality is likely to start at the top of its government, making its way down to the individuals that act for it in the form of a directive. In either instance the monetary liability will have introduced "an unwarranted and unconscionable consideration into the decision-making process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy."[90]

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[88] Owen, 100 S.Ct. at 1410.
[89] *Id.* at 1408.

The specter of governmental paralysis is of even greater concern because the scope the Court has given its decision places municipalities in the unlikely position of having to anticipate constitutional developments rather than merely comply with them. Although the facts upon which the case was decided occurred before the Supreme Court had held that a governmental employee has a right to a discharge hearing to clear his name, the Court has nonetheless held that the City of Independence violated Owen's constitutional rights. As Justice Powell states in his dissent:

> "As a result [of the Court's decision] local governments and their officials will face the unnerving prospect of crushing damage judgments whenever a policy valid under current law is later found to be unconstitutional."[91]

In addition to quietly imposing a retroactive liability, Owen is silent as to its effect on Monell. In Monell, the Court stated that the employer-employee relationship could not be the basis for the municipality's liability, implying that some defense remained for the municipality, even if its employee was found to have violated the Constitution. Yet, in Owen, the Court held the municipality to a standard of strict liability regardless of whether or not the persons who act on the municipality's part are liable. In Monell, the nexus between the municipality and its employee was held to be a "policy" or "custom."[92] In light of Owen, the definition, if not the very existence, of the policy or custom requirement is obscured. Even more disconcerting, from the viewpoint of municipalities, is that Owen was based on a single instance, not on the enforcement of a policy or custom. While it is true that the City of Independence did not have a procedural mechanism for hearings on dismissals, which well might be considered a custom, it was the City's handling of Owen's dismissal, combined with its surrounding publicity, that gave rise to the cause of action, and nothing indicates that this was the standard practice.

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[90] *Id.* at 1418.
[91] *Id.* at 1421 (Powell, J. dissenting.).

As a result of Owen, then, it appears that municipalities will be held strictly liable under Section 1983 for any Constitutional violations committed through its employees or officers, regardless of the liability of those employees or officers. In addition, municipalities may become liable for violations of constitutional rights which are yet to be defined, even if, at the time they occur, the actions complained of fall within the framework of existing constitutional law. What constitutes custom or policy is still in question and when, if ever, that test will be applied to determine the existence of a cause of action against a municipality poses an even greater concern.

The magnitude of these problems was promptly increased under State of Maine v. Thiboutot.[93]

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[92] Monell, 436 U.S. at 690-91.
[93] 48 U.S.L.W. 4859 (June 25, 1980).

D. *Thiboutot* and Expanding Constitutional Rights

In a brief opinion delivered two months after Owen the Supreme Court further defined Section 1983 and vastly expanded its scope by holding that Section 1983 encompasses claims based exclusively on statutory violations of federal law.

The respondents were married and had eight children, three of whom were the husband's by a previous marriage. The respondents had challenged the State's interpretation of a provision of the Social Security Act[94] by which it decided that, in computing the husband's AFDC benefits for his own three children, the State would not make an allowance for the money spent in support of the other five children. The respondents amended their complaint in the State court to bring a class action under Section 1983. The lower court had enjoined the State from enforcing the rule and ordered it to adopt new regulations, notify class members of the new regulations and pay the respondents and other class members the correct amounts. Respondents' request for attorney's fees was denied and they appealed to the Supreme Judicial Court of Maine[95] which held that the respondents were not entitled to fees under State law, but could collect attorney's fees under the Civil Rights Attorney's Fee Award Act of 1976.[96]

The Supreme Court considered the meaning of "secured by the Constitution and laws", to determine whether the respondents could bring an action under Section 1983. Relying on the plain meaning rule, the Court held that the language of Section 1983 included the respondents' claim of a violation of the Social Security Act.[97]

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[94] 42 U.S.C. §602(a)(7) (1976).

[95] 405 A.2d 230 (Me. 1979).

[96] 42 U.S.C. §1988 (1976).

[97] 48 U.S.L.W. at 4860.

Restating the "broad remedy" conception of Section 1983 it had enunciated in Monell and Owen, the Thiboutot court looked to dicta from various cases and to a portion of the legislative history of the Civil Rights Act of 1871. Once again finding "that the legislative history does not permit a definitive answer,"[98] the Court nevertheless concludes that there are "no indications" that Congress intended other than what the Court had held.[99] Turning to the question of attorney's fees, the Court simply noted, citing the plain meaning of, in this instance, Section 1988, that "the fee provision is part of the Section 1983 remedy whether the action is brought in federal or state court."[100]

Justice Powell examined the legislative history and plain meaning rule as well, in an emphatic dissent in which he was joined by Chief Justice Burger and Justice Rehnquist.[101] In his reading of the legislative history, Justice Powell explained that the phrase "and laws" was added to Section 1983 when Congress consolidated the laws in 1874. Congress expressed no desire to change the laws and that the insertion of "and laws" was inadvertent is evidenced by an examination of the other sections of the Civil Rights Act of 1871, which were separated during the codification.[102] Justice Powell also refuted the Court's interpretation of the plain meaning rule, saying that if the reference were to all federal laws, the term would have appeared in the disjunctive "Constitution or laws," rather than the conjunctive.[103] Finally, Justice Powell took the Court to task for the lack of precedent for its ruling in resting "a landmark decision" on "two statements made in dictum without critical examination."[104]

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[98] 48 U.S.L.W. at 4861.
[99] *Id.*
[100] *Id.*
[101] *Id.* at 4863 (Powell, J., dissenting).
[102] *Id.* at 4864.
[103] *Id.* at 4862.
[104] *Id.* at 4868.

In his dissent Justice Powell gave his assessment of the effect of the majority's decision, stating:

> In practical effect, today's decision means that state and local governments, officers and employees[ ] now may face liability whenever a person believes he has been injured by the administration of *any* federal-state program, whether or not that program is related to equal or civil rights."[105]

To graphically demonstrate his point, Justice Powell appended to his dissent a compilation of what he termed a "small sample of statutes that arguably could give rise to §1983 actions after today.[106]

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[105] *Id.*, at 4865.

[106] *Id.*, at 4868. Justice Powell's list is self explanatory:

> A small sample of statutes that arguably could give rise to §1983 actions after today may illustrate the nature of the "civil rights" created by the Court's decision. The relevant enactments typically fall into one of three categories: (A) regulatory programs in which States are encouraged to participate, either by establishing their own plans of regulation that meet conditions set out in federal statutes, or by entering into cooperative agreement with federal officials; (B) resource management programs that may be administered by cooperative agreements between federal and state agencies; and (C) grant programs in which federal agencies either subsidize state and local activities or provide matching funds for state or local welfare plans that meet federal standards.
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> A. Joint regulatory endeavors
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> 1. Federal Insecticide, Fungicide, and Rodenticide Act, 86 Stat. 973 (1972), as amended, 7 U.S.C. §§136 et seq.; see e.g., 7 U.S.C. §§136u, 136v.
> 2. Federal Noxious Weed Act of 1974, 88 Stat. 2148 (1975), 7 U.S.C. §§2801-2813; see 7 U.S.C. §2808.
> 3. Historic Sites, Buildings, and Antiquities Act, 49 Stat. 666 (1935), as amended, 16 U.S.C. §§461-467; see 16 U.S.C. §462(e).
> 4. Fish and Wildlife Coordination Act, 48 Stat. 401 (1934), as amended, 16 U.S.C. §661-666c; see 16 U.S.C. §661.
> 5. Anadromous Fish Conservation Act, 79 Stat. 1125 (1965), as amended, 16 U.S.C. §757a-757d; see 16 U.S.C. §757a(a).
> 6. Wild Free-Roaming Horses and Burros Act, 85 Stat. 649 (1971), as amended, 16 U.S.C. §§1331-1340; see 16 U.S.C. §1336.
> 7. Marine Mammal Protection Act of 1972, 86 Stat. 1027, as amended, 16 U.S.C. §§1361-1407; see 16 U.S.C. §1379.
> 8. Wagner-Peyser National Employment System Act, 48 Stat. 113 (1933), 29 U.S.C. §§49 et seq.; see 29 U.S.C. §49g (employment of farm laborers).
> 9. Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U.S.C. §§1201-1328; see 30 U.S.C. §1253.
> 10. Interstate Commerce Act Amendments of 1935, 49 Stat. 548, as amended, 49 U.S.C. §11502(a)(2) (enforcement of highway transportation law).

A curious aspect of Thiboutot is the Court's adherence to its interpretation of Section 1983 as including the action based on the Social Security Act, as well as other actions based

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B. Resource Management [Sic]

1. Laws involving the administration and management of national parks and scenic areas: e.g., Act of May 15, 1965, §6. 79 Stat. 111, 16 U.S.C. §281e (Nez Perce National Historical Park); Act of Sept. 21, 1959, §3, 73 Stat. 591, 16 U.S.C. §410u (Minute Man National Historical Park); Act of Oct. 20, 1972, §4, 86 Stat. 1302, 16 U.S.C. §460bb-3(b) (Muir Woods National Monument).
2. Laws involving the administration of forest lands: e.g., Act of March 1, 1911, §2, 36 Stat. 961, 16 U.S.C. §§563; Act of Aug. 29, 1935, ch. 808, 49 Stat. 963, 16 U.S.C. §§567a-567b.
3. Laws involving the construction and management of water projects: e.g., Water Supply Act of 1958, §301, 72 Stat. 319, 43 U.S.C. §390b; Boulder Canyon Project Act, §§4, 8, 45 Stat. 1058, 1062 (1928), as amended, 43 U.S.C. §§617c, 617g; Rivers and Harbors Act of 1899, §9, 30 Stat. 1151, 33 U.S.C. §401.
4. National Trails System Act, 82 Stat. 919 (1968), as amended, 16 U.S.C. §§1241-1249; see 16 U.S.C. §1246(h).
5. Outer Continental Shelf Lands Act Amendment of 1978, §208, 92 Stat. 652, 43 U.S.C. §1345 (oil leasing).

C. Grant programs

In addition to the familiar welfare, unemployment, and medical assistance programs established by the Social Security Act, these may include:

1. Food Stamp Act of 1964, 78 Stat. 703, as amended, 7 U.S.C. §2011-2025; see, e.g., 7 U.S.C. §2020e-2020(g).
2. Small Business Investment Act of 1958, §602(d)(1), 72 Stat. 698, as amended, 15 U.S.C. §636(d).
3. Education Amendments of 1978, 92 Stat. 2153, as amended, 20 U.S.C. §§2701 et seq.; see, e.g., 20 U.S.C. §§2734, 2902.
4. Federal-Aid Highway legislation, e.g., 21 U.S.C. §§ 128, 131.
5. Comprehensive Employment and Training Act Amendments of 1978, 92 Stat. 1909, 29 U.S.C. §§801 et seq.; see, e.g., 29 U.S.C. §§823, 824.
6. United States Housing Act of 1937, as added, 88 Stat. 653 (1974), as amended, 42 U.S.C. §1437 et seq.; see; e.g., 42 U.S.C. §§1437d(c), 1437j.
7. National School Lunch Act, 60 Stat. 230 (1946), as amended, 42 U.S.C. §§1751 et seq.; see, e.g., 42 U.S.C. §1758.
8. Public Works and Economic Development Act of 1965, 79 Stat. 552, as amended, 42 U.S.C. §§3121 et seq.; see, e.g., 42 U.S.C. §§3132, 3151a, 3243.

solely on a federal statute, in the face of its acknowledgement that there is no jurisdiction for the action under 28 U.S.C. §1343(3),[107] noting that it merely means "that there are statutory rights which Congress has decided cannot be enforced in the federal courts unless 28 U.S.C. §1331(a)'s $10,000 jurisdictional amount is satisfied."[108] Section 1343(3) is the jurisdictional counterpart of Section 1983, both provisions having originally been found in Section 1 of the Civil Rights Act of 1871.[109] The jurisdictional portion of Section 1 was divided into two sections when the statutes were recodified in 1874, one section providing for district court jurisdiction,[110] the other for circuit court jurisdiction.[111] The language referring to the Constitution and laws varied in each section, but when the jurisdiction of the district and circuit courts was merged in 1911,[112] the narrower provision, found today in Section 1343(3) was retained for jurisdictional purposes.

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9. Justice System Improvement Act of 1979, 93 Stat. 1167, 42 U.S.C. §§3701-3797; see, e.g., 42 U.S.C. §§3742, 3744(c).
10. Juvenile Justice and Delinquency Prevention Act of 1974, 88 Stat. 1109, as amended, 42 U.S.C. §§5601 et seq.; see, e.g., 42 U.S.C. §5633.
11. Energy Conservation and Production Act of 1976, 90 Stat. 1125, as amended, 42 U.S.C. §§6801 et seq.; see, e.g., 42 U.S.C. §§6805, 6836.
12. Developmentally Disabled Assistance and Bill of Rights Act, 89 Stat. 486 (1975), as amended, 42 U.S.C. §§6001 et seq.; see, e.g., §§6011, 6063.
13. Urban Mass Transportation Act of 1964, 78 Stat. 302, as amended, 49 U.S.C. §§ 1601 et seq.; see, e.g., §§1602, 1604(g)(m).

[107] Section 1343(3) confers original jurisdiction on the district courts for civil actions authorized by law "to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress *providing for equal rights of citizens* or of all persons within the jurisdiction of the United States." [Emphasis added.]

[108] Thiboutot, 48 U.S.L.W. at 4861 n.6.

[109] 17 Stat. 13.

[110] Rev.Stat. §563(12).

[111] Rev.Stat. §629(16).

[112] Act of March 3, 1911, §24 (Fourteenth), 36 Stat. 1092.

By elevating the action brought in Thiboutot to the level of a Section 1983 action, the Court has disregarded the jurisdictional requirement that has derived from the original Civil Rights Act of 1871, a requirement that clearly underscores the very origins of Section 1983 as a civil rights remedy. In addition, because the Court has determined that the cause of action in Thiboutot is a Section 1983 claim, it has simultaneously expanded the liability of municipalities for attorney's fees under Section 1988.

The majority did not consider the effect of its decision, however, advising that the arguments against it "can best be addressed to Congress."[113]

III. THE NEED FOR CONGRESSIONAL ACTION

It can be expected that, in the wake of Monell, Owen and Thiboutot, local governments will be exposed to an ever-increasing number of suits brought under Section 1983. Those suits, since Thiboutot, can be expected to include claims based solely on federal statutes that are administered through state or local governments. It appears, since Owen, that a single act, even one departing from the policy or custom of a municipality, or one that does not of itself become a policy or custom, can subject a municipality to liability. Under Owen, good faith efforts to meet constitutional standards will not free a municipality from liability under Section 1983, even if the action were not found to be unconstitutional until a later time. Under Thiboutot, the retroactive effect of Owen can be applied to actions based on good faith efforts to implement federal statutory rights as well as civil rights. While, according to Monell, *respondeat* superior cannot be used to impute liability to a municipality for the acts of its employee, it appears that, under Owen, the municipality will be liable in a Section 1983 action regardless of the liability of the employee, if the act itself violated either a constitutional right or, under Thiboutot, a federal statute.

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[113] Thiboutot, 48 U.S.L.W. at 4861.

With the availability of attorney's fees under Section 1988 in either the federal or state courts, would-be plaintiffs will be provided with an additional incentive to bring an action against a municipality. The availability of attorney's fees may also provide an incentive to some attorneys to seek out clients, not to remedy their injuries, but to garner fees under Section 1988, even where damages are nominal or the relief is equitable.[114]

The impact of such an expansion will be quickly felt by municipalities forced to defend an ever-increasing number of actions for an ever-widening scope of liability. The cost of defending against Section 1983 actions can be expected to increase as the number of cases increases. The cost of satisfying judgments can be expected to increase as the number of defenses available to municipalities disappears. At the same time, the instances in which the municipality will be assessed plaintiffs' attorney's fees, as well as the amounts of the fees awarded, can also be expected to rise.

The Courts, both state and federal, will also bear an increasing administrative burden in the face of a mushrooming number of civil rights claims.

As the municipalities feel the financial impact of their increased defense burden, they can be expected to respond in the very way the Supreme Court has expected individual Section 1983 defendants

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114. While such a thought may seem cynical, indeed, the situation posed is real, as can be attested to by the many municipalities being forced to defend more claims under Section 1983 that can only be characterized as "frivolous".

to respond: in the exercise of extreme caution in the face of strict liability, they are likely to issue orders to lower echelon employees not to act if there is the slightest question about potential liability. While they are being frozen into inaction, the municipalities can also be expected to be faced with financial problems caused by increasing expenditures that are difficult, if at all possible, to plan for adequately.

The Supreme Court, with little concern for the impact of its decisions, has attempted to give effect to the intention of the Forty-second Congress. Ironically, it has only succeeded in making it clear that the legislative history is not susceptible to a definitive analysis. Clinging nonetheless to the unsure history, the Court has made its pronouncements and, unless there is some action by Congress, the unsure history and, at times, tortuous logic will be left for the Court to explain or change. In view of the reluctance with which the Court overruled *Monroe v. Pape*, it is unlikely that it will so soon again abandon the principle of *stare decisis* in order to stem the tide of Section 1983 actions.

In *Monell*, *Owen* and *Thiboutot*, the Court displayed its awareness that it is Congress which must effect any changes in the law,[115] and it is becoming increasingly obvious that the time has come for a Congressional reevaluation of Section 1983 and a redefinition of its purposes. Such a need has already been recognized by some legislators and two bills are now pending in Congress.[116]

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[115] Monell, 436 U.S. at 695, Owen, 100 S.Ct. at 1415, Thiboutot, 48 U.S.L.W. at 4861.

[116] H.R. 1974, proposed by Congressman Lent on February 8, 1979, attempts to restore the immunity enjoyed by municipalities under *Monroe v. Pape*. S. 1983, proposed by Senators Mathias, Metzenbaum, Kennedy and Javits on November 6, 1979, would expand Section 1983 to reflect *Monell*. Neither piece of legislation addresses the problems posed by *Owen* and *Thiboutot*.

IV. PROPOSED AMENDMENTS TO SECTION 1983:

If amendments to Section 1983 were proposed, what areas should they cover? Preliminarily, it should be recognized that the restoration of absolute immunity is not a real possibility, for it would return civil rights litigation to its feeble, pre-Monroe v. Pape status. It is unlikely that Congress would give serious consideration to a formal debilitation of Section 1983.

Therefore, the basis for any amendment to Section 1983 should be toward striking a balance between the concerns of the potential plaintiffs and defendants. On the one hand, it is necessary to acknowledge that constitutional rights are still all too frequently violated, although the nature of those violations may have changed since the Civil Rights Act of 1871 was enacted. On the other hand, it must not be overlooked that, if local governments are to remain viable, they must also remain financially sound. The focus of an amendment to Section 1983, then, should be toward the limitation of liability.

Any amendment to Section 1983 should address the following areas:[117]

1. A remedy should be afforded only for violations of constitutional rights, either as they are stated directly in the Constitution, or as they are implemented through laws passed under the enforcement powers of the Fourteenth Amendment.[118] This would bring Section 1983 back into line with the concerns of its original drafters and with its jurisdictional counterpart in 28 U.S.C. §1343(3).

While this necessitates a withdrawal from the holding in Thiboutot, it presents a wise course of action as well as a historically sound one, for the growing number of federal laws that are implemented through the cooperative efforts of the federal and local governments would simultaneously continue to increase the liability of government. Furthermore, the elevation by the

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[117] Appendix A to this article contains a draft of an amendment to Section 1983 which fulfills these requirements.

[118] U.S. Const. amend. XIV, §5.

Thiboutot Court of federal legal rights to the level of Constitutional rights seems an unnecessary and dubious extension of what the Forty-second Congress intended. It is doubtful that the Congress sitting in 1871 in its cautious imposition of liability under the Civil Rights Act of 1871 could have foreseen the growth of the federal government and its resulting involvement in the workings of state and local governments.

2. The good faith defense should be restored to municipalities, so that the municipalities cannot be held liable if their employees are not liable. This position is a retreat from Owen and would eliminate the post-Owen oddity of imposing a retroactive liability for the failure to correctly predict developments in Constitutional law.

3. There should be a clarification and reaffirmation of the holding in Monell that the theory of respondeat superior may not be used to impute liability to a municipality where the employee performs a single act that is not pursuant to a statute, ordinance, regulation, custom, or usage of the governmental entity being used. The definition of "policy or custom" is probably best left for the Courts to define, especially if the language of the amended Section 1983 makes clear that a single act, or isolated incidents, do not constitute a policy or custom.

4. There should be a uniform statute of limitations. Because a Constitutional right is involved, the length of time the cause of action survives should be the same regardless of where the underlying incident occurs or where the subsequent action is brought. Two years is a common statute of limitations for state tort actions and is a reasonable period of time for the bringing of the constitutional tort created by Section 1983, for it allows a plaintiff sufficient time to bring the action while eliminating the seemingly perpetual liability of governmental entities resulting from Owen. It should be noted that a statute of limitations

will not present an obstacle where the claim is based on a policy or custom, for the cause of action arises due to the continuing nature of the municipality's actions. Thus, the accrual of the cause of action would be based on the most recent date during which the policy or custom was still in effect.

5. A notice requirement similar to those found in state tort immunity statutes should be included. By requiring a plaintiff to notify its prospective governmental defendant within a specified period of time of his intention to bring a civil rights action, Section 1983 will afford the governmental defendant an opportunity to consider the potential liability in making its financial plans, while still preserving the individual's right to pursue a civil rights claim.

The foregoing considerations reflect an attempt to strike a balance between the need to provide a viable remedy for constitutional violations while preventing local governments from being subjected to such extreme or excessive liability that their ability to function is jeopardized.

V. PROPOSED AMENDMENTS TO SECTION 1988

Essential to any solution of growing municipal liability for civil rights claims under Section 1983 is a concurrent effort to lessen the effects of the Civil Rights Attorney's Fees Act, which added the following language to Section 1988 of Title 42 of the United States Code:[119]

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States

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[119] Pub. L. 94-559, §2, Oct. 19, 1976, 90 Stat. 2641 [amending 42 U.S.C. §1988 (1975)].

> Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The Act marks a departure from the so-called "American rule" under which individual parties to a lawsuit pay their own attorney's fees.[120] The Act rests on a private attorney general theory and was intended to encourage the private enforcement of civil rights.[121] Although it has been pointed out that the Act was not passed for the purpose of encouraging marginal claims,[122] it seems to have had precisely that effect, forcing municipalities to defend claims which at best can be characterized as "marginal."

Besides generating civil rights litigation, the Act has spawned numerous other problems. Despite the fact that the awarding of attorney's fees is discretionary rather than mandatory, the Courts have uniformly granted attorney's fees to successful plaintiffs as a matter of course, unless "special circumstances" are present.[123] At the same time, attorney's fees have rarely been awarded to successful defendants, and then only in the most extreme cases.[124] In addition, the courts have interpreted "prevailing party" to mean one who has essentially succeeded in achieving the goal of his suit, although this necessitates neither a final judgment on the merits[125] nor success in obtaining the specific relief sought in the complaint.[126] Fees have also been allowed in preparing and pursuing the petition for the fees,[127] including taking the case up on appeal.[128] Furthermore, because the Act was passed while the holding of Monroe v. Pape was in effect and municipalities were immune from suits under Section 1983, and because attorney's fees have not been assessed against individual defendants who are protected by a good faith immunity,[129] it appears that local governments may be liable for attorney's fees under Section 1988 regardless of whether or not they have been named as a party.

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[120] Izard v. Arndt, 483 F.Supp. 261, 265 (E.D. Wisc. 1980); Kulkarni v. Nyquist, 446 F.Supp. 1274 (N.D. N.Y. 1977).

[121] Unemployed Workers Organizing Committee v. Batterton, 477 F.Supp. 509 (D. Md. 1979); Rheuark v. Shaw, 477 F.Supp. 897 (N.D. Tex. 1979).

[122] *See* Furtado v. Bishop, 84 F.R.D. 671 (D.C. Mass. 1979).

[123] Johnson v. State of Mississippi, 606 F.2d 635 (5th Cir. 1979). The "special circumstances" do not include a plaintiff's interest that is basically financial (International Oceanic Enterprises, Inc. v. Menton, 614 F.2d 502 (5th Cir. 1980)), the plaintiff's ability to pay the fee (Bunn v. Central Realty of Louisiana, 592 F.2d 891 (5th Cir. 1979)), or the fact that the plaintiff is represented by a public agency. (Webb v. Agrey, 481 F. Supp. 651 (N.D. Ohio 1979).)

In practice, the Attorney's Fees Act appears to be less of a catalyst for generating good faith civil rights litigation than for encouraging the bringing of questionable claims, the prolonging of litigation in order to increase the amount of fees collected and the beginning of a practice in which some attorneys seek out potential Section 1983 plaintiffs for the purpose of urging them to bring an action. These negative aspects of the Act indicate that the Congress should reexamine the language of the Act in the light of its practical effects in order to redefine the way it will attempt to achieve its original goal.

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[124] The plaintiff's claims must be "groundless," "vexatious" or "frivolous" to entitle defendants to collect attorneys's fees. Bowers v. Kraft Foods Corp., 606 F.2d 816 (8th Cir. 1979); Lampkin v. Bryan, 479 F.Supp. 172 (N.D. Miss. 1979); Ohland v. City of Montpelier, 467 F.Supp. 324 (D. Vt. 1979); Isaacs v. Temple University, 467 F.Supp. 67 (D.C. Pa. 1979).

[125] *See, e.g.* Aho v. Clark, 608 F.2d 365 (9th Cir. 1979); Unemployed Workers Organizing Committee, *supra;* Ohland v. City of Montpelier, *supra.*

[126] Bagby v. Beal, 606 F.2d 411 (3rd Cir. 1979).

[127] Lackey v. Bowling, 476 F.Supp. 1111 (N.D. Ill. 1979).

[128] McManama v. Lukhard, 616 F.2d 727, (4th Cir. 1980).

[129] Universal Amusement Co., Inc. v. Hofheinz, 616 F.2d 202, 204 (5th Cir. 1980); Parks v. Goff, 483 F.Supp. 502 (E.D. Ark. 1980).

In the course of reconsidering Section 1988, recognition should be given to the fact that, under the American rule, it is common to incorporate the cost of the litigation into the amount being sought in damages. This practice is recognized by the parties in arriving at settlement figures and by juries in determining damage awards. Consequently, any amendment to Section 1988 should include a mandatory criterion for the setting of the amount which would require the court to examine the potential impact of the case. If the case carves out a new area of civil rights law, or if the case will have a widespread impact, the prevailing party's attorney would be entitled to a larger fee than would be appropriate where the nature of the case is similar to a personal injury case, such as an injury suffered at the hands of a police officer. In the latter instance, the judgment will be of little import or interest beyond the parties directly involved and the fees awarded should be so limited.

Any amendment should also further define "prevailing party," so as to allow recovery by municipalities successfully defending against frivolous actions. The Act should further require that fees may be assessed against a municipality only if that municipality is adjudged liable under one of the sections included in Section 1988. This would eliminate any vicarious liability for attorney's fees where the municipality cannot be held vicariously liable for the acts of its employees or officials.

An amendment of Section 1988 based on the foregoing considerations would go a long way toward ensuring that potential plaintiffs with valid civil rights claims are not deterred from pursuing them, while protecting municipalities from an excessive financial burden and the courts from an excessive administrative burden.

VI. CONCLUSION

Section 1983 was enacted during the post-Civil War Reconstruction period, a time when Congress was concerned about the violent response to the freeing of the slaves and new constitutional pronouncements of equality. That violence was most often inflicted by the Ku Klux Klan and was tolerated, if not supported, by states and local governments which selectively enforced their laws, failing to give support and protection to those who did not share the Klan's prejudices.

In the 110 years since Section 1983 has been in existence, the courts at various times have resorted to a literal interpretation and an examination of the legislative debates surrounding the enactment of the statute in order to find its true meaning and the intent of the Forty-second Congress. The results can hardly be considered to be consistent and, in the span of two years, the Supreme Court's reading of Section 1983 has taken municipalities from absolute immunity to strict liability for actions under Section 1983 and expanded the scope of that Section to include all federal laws as well as Constitutional rights.

That the problems in the application of Section 1983 may be caused by the language of the statute itself was recognized by Justice Frankfurter in United States v. Wiliams:[130]

> "The dominant conditions of the reconstruction period were not conducive to the enactment of carefully considered and coherent legislation. Strong post-war feelings caused inadequate deliberation and led to loose and careless phrasing of laws related to the new political issues."

While the issues are no longer new, they have taken on new characteristics which reflect the developments in American society in the past 100 years. Nevertheless, the phrasing remains the same and the problems it has caused during the past century can only be expected to continue. Had the Supreme Court not decided Monell,

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[130] 341 U.S. 70, 77 (1951).

Owen, and Thiboutot the need for a reevaluation of Section 1983 would have been warranted simply due to changes caused by the passage of time. The need has been magnified by the decisions in Monell, Owen, and Thiboutot and their labored examinations of legislative history that the Court itself acknowledges is not definitive. The time has come, then, for Congress to examine the action and reasoning of its predecessors in the Forty-second Congress and to bring them into line with the realities of civil rights violations in contemporary America and the equally difficult realities of the limited financial resources of modern local governments.

The courts have grappled with the subject with questionable results, due in great part to the fact that they are neither equipped nor empowered to redefine Section 1983. That task properly belongs with the legislative branch of government, a task which must be undertaken to prevent the inexorable paralysis of municipalities under the current interpretations of Section 1983.

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A BILL

To amend Section 1979 of the Revised Statutes to limit the liability of political subdivisions based on violations of civil rights; to establish rules of liability with respect to such political subdivisions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Revised Statutes Section 1979 (42 U.S.C. 1983) is amended as follows:

(1) By inserting "(a)" immediately before "every"; and

(2) By adding the words "civil rights" immediately before "laws"; and

(3) By adding at the end thereof the following new subsections:

"(b) In any action, suit or proceeding under the provisions of this Section, a political subdivision of a State, including a municipality, county, town, burrough, parish, village or school district, shall be immune from liability for damages where the act complained of was performed in good faith by its officials or employees.

APPENDIX A

"(c) In any action, suit or proceeding under the provisions of this Section, a political subdivision of a State, including a municipality, county, town, burrough, parish, village or school district, shall not be vicariously liable for the actions of its officials or employees where the act complained of was not in furtherance of any of its statutes, ordinances, regulations, customs, or usages.

"(d)(1) Every civil action commenced under this Act shall be barred unless the complaint is filed within two years after the right of action first accrues.

(2) Every civil action commenced under this Act shall be barred unless, within six months from the date that the right of action first accrues, any person who is about to commence a civil action under this Act against a political subdivision of a State, or against any of its employees whose act or omission committed while acting in the scope of his employment as such employee caused the injury, must serve, either by personal service or by registered or certified mail, return receipt requested, a written notice on

> the Secretary or Clerk, as the case may be, for the political subdivision of the State against whom or against whose employee the action is contemplated a written statement, signed by that person, his agent, or attorney, giving in substance the following information: The name and residence of the person to whom the right of action has accrued, the nature of the conduct giving rise to the person's right of action, a statement of the statute, ordinance, regulation, custom, or usage, under which such conduct occurred, the date, location and approximate time that the conduct occurred, and the nature and extent of relief sought."

Sec. 2. Nothing contained in this Act shall be construed to deny the availability of alternative remedies under any other provision of Federal law or impair the availability of any other remedy for denial of any rights, privileges, or immunities secured by the Constitution or laws of the United States in the courts of the United States or of any State, territory, political subdivision thereof, or the District of Columbia.

Sec. 3. In evaluating the need for relief under this Act, no court of the United States shall consider the availability of a remedy under the laws, ordinances, or regulations of any State, territory, political subdivision thereof, or the District of Columbia.

Sec. 4. The amendment made by the first section of this Act shall take effect upon the date of its enactment, except that with respect to the amendments made by subsection (d)(1) and (2) of this Act, any right of action which may have accrued before the date of the enactment of this Act but for which a complaint has not yet been filed shall be deemed to have accrued as of the date of the enactment of this Act.

UNIQUE CASES

1. Novak vs. Conroy & Barrington - Circuit Court of Cook County, transferred from Lake County (80 L 881) - Basic P.I. case - Auto Accident - Defendant Conroy, Chief of Police of Village of Schaumburg, traveling with his wife, were struck by plaintiff's car, plaintiff arrested for DWI - found not guilty in jury trial - suing for $300,000 for Civil Rights violation.

2. Andre vs. Board of Trustees of Village of Maywood - U.S. District Court 76 C 1051, No. 77-1337 in U.S. Court of Appeals, 77-609 in U.S. Supreme Court - suit brought by various employees of Village alleging deprivation of Civil Rights because of ordinance passed requiring residency in Village within 2 years - District Court dismissed complaint and U.S. Court of Appeals affirmed - Cert denied.

3. Gardner vs. West Chicago, 80 L 1617 (DuPage County) - plaintiff arrested and charged with theft of a trailer after positive identification by owner. Plaintiff was subsequently indicted by grand jury. Charge later dismissed by Assistant State's Attorney, saying it was more properly handled as a civil matter. Plaintiff filed a Civil Rights action.

4. Moore vs. Sandford - Defendant is a Westmont police officer - was off duty and attending a motion picture with his wife - a dispute arose over plaintiff and her husband smoking, drinking and making noise in the theatre - usher asked plaintiffs out of threatre and defendant tried to quiet plaintiff - argument followed and some pushing - plaintiffs sued claiming officer acted "under color of law."

5. Patterson vs. Palatine - report received from neighboring village to pick up the occupants of a certain described vehicle - police found the vehicle in a school parking lot - inside the vehicle were four

individuals, including 2 minor plaintiffs - officers took them all to Palatine Police Department and held them for approximately 45 minutes until Buffalo Grove identified two occupants as the offenders - plaintiffs were then released. District Court granted motion to dismiss against Village under Monell and granted individual defendant summary judgment on the basis they had probable cause to make the stop - plaintiffs have appealed the summary judgment to the 7th Circuit.

6. U.S. Labor Party vs. Village of Bridgeview - plaintiffs sued because they were not allowed to solicit funds in the street, pursuant to state law - plaintiffs did not allege the state statute was unconstitutional - plaintiffs named me as a defendant because I wrote an opinion, advising the Chief of Police to enforce state law - motion for preliminary injunction was denied, appealed to 7th Circuit - which affirmed. Application for permanent injunction also denied, and affirmed by 7th Circuit - plaintiffs' attorney was Northwestern Legal Foundation - I believe they used this case as a training ground for their employees.

7. Harris Trust & Savings Bank vs. Mt. Prospect - suit filed (#1983) over denial of certain building permits - there was also pending a state case in which a consent decree was finally entered - this dispute was over interpretation of decree - trial court dismissed claim since plaintiffs could have raised issues in state case, which still retained jurisdiction of parties.

8. Entertainment Concepts vs. Westmont - suit over zoning ordinance and ordinance regulating motion picture operators. Plaintiff was going to show X-rated movies - no action taken against plaintiff to enforce ordinance and plaintiff had not applied for a special use zoning permit - trial court held ordinances unconstitutional - denied damages and attorney's fees - 7th Circuit reversed on attorney's fees only - Supreme Court denied cert, notwithstanding decision in Virginia vs. Consumers Union of U.S.

Senator HATCH. Mr. Cutler?

TESTIMONY OF ROGER F. CUTLER, CITY ATTORNEY, SALT LAKE CITY, UTAH, REPRESENTING THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

Mr. CUTLER. Thank you, Mr. Chairman.

It is an honor for me to be here as the representative of a rather small community, even if we would like to think of it as the center of the universe.

Senator HATCH. It is getting bigger all the time.

Mr. CUTLER. We may agree with that observation, but I realize that, in a national sense, we are—perhaps—a backwater. But I am here in the capacity of representing Salt Lake City and, also, as a member of the board of trustees for NIMLO. I appreciate the opportunity that this subcommittee has given me in those capacities to have a forum to express my concerns over recent court decisions relating to the civil rights acts.

I was extremely interested in the testimony of the two professors who testified just before me. Mr. Chairman, you may have noticed--or you may have been out of the room while they were speaking—the complete divergence of opinion they expressed on one particular subject.

Senator HATCH. That is why we chose them.

I might interrupt you for a second, Roger. Other Senators desire to submit questions, so we will keep the record open. I notice both professors are here. We will submit questions, and we hope that you will answer them as quickly as you can in writing so that we can include those as part of the record. And I suspect we will be submitting questions to each of you.

Keep going, Roger. I am sorry to interrupt you.

Mr. CUTLER. Thank you.

Reading from Professor Abernathy's statement that I received, he said that if one wanted to ask knowledgeable lawyers only 2 years ago to explain the significance of the "and laws" language of section 1983, they would have described an obscure jurisdictional issue. He went on to explain that there now was a significant new meaning attached to those words by the *Thiboutot* decision. On the other hand, Professor Steinglass was of the judgment that *Thiboutot* merely codified existing law.

From the experience I have had and from discussing this matter with lawyers that are dealing with section 1983 issues on a case-by-case basis—not merely from an academic point of view—we would agree wholeheartedly with Professor Abernathy's evaluation. He is correct, not only on the practical effect but, also, in the way the law has been historically applied.

We would view the *Monell* decision, the *Owen* decision, and the *Maine* decision as constituting a radical shift; in fact and in substance, they constitute an amendment by the Supreme Court of section 1983—the so-called Ku Klux Klan Act of 1871, as amended by Congress in 1874.

I do not think you could get a group of municipal attorneys together but, within 5 minutes, they would be lamenting and telling horribles about: (*a*) their status in and the number of section 1983 cases that have been filed against they; (*b*) the spurious nature of most of that litigation; (*c*) the risk and unreasonable exposure to attorney's fees they now have; and (*d*) the financial exposure that their communities have which is just about dominating their municipal legal practice and, in fact, every administrative decision of their cities.

From my experience and from talking to my colleagues here in NIMLO and at the recent convention, I am sure it would not be possible to get a few municipal attorneys together without them expressing, not only a parade of horribles, and—perhaps—wringing their hands over where the law is going; but also stating that their offices are, in fact, becoming the center of the city operations. Municipal operations are, in effect, being paralyzed by administrators who are so concerned about liability, not for themselves but against their jurisdictions, that they are shifting the responsibility of making the decision to law departments. As a result, many decisions in local government, I think, are being paralyzed.

It is not my purpose nor my colleagues' purpose to make any amendments that would interfere with the legitimate enforcement of civil rights laws or to interfere with a Federal statutory right's enforceability against a city where appropriate. This fact is particularly true where Congress has indicated its intention, whether express or not, to permit individuals to sue and vindicate their Federal statutory rights in courts against local governments.

However, we are concerned with the new exposure to liability and the interference with local government introduced by these recent court decisions. These concerns need to be addressed immediately by Congress.

I think there are perhaps several things I would like to address, but in the interest of time maybe I could just list some of them in a summary fashion and then talk to the specific topic I have been assigned.

I am concerned that there be a balanced federalism. I see an increasing effort to convert section 1983 actions into a comprehensive system of Federal tort law. Thereby, States and local government will be deprived of their proper roles and State common law will be supplanted by a comprehensive body of Federal tort law.

I am concerned about the notion that is expressed in *Owens* and in the 10th circuit case, mentioned in note 15 of the *Owen* case, which states that taxpayers—and I will use that term rather than "local government" because, as my colleagues pointed out, that is what we are talking about—have now become common insurers. Notwithstanding the absolute and unquestioned good-faith actions of municipal officials or their reasonable reliance on existing constitutional law—whether the subjective or objective test or both of them are being applied—they can still render their employing government entities liable for substantial monetary damages. These awards can come through damage awards or the attorney's fees and the costs provisions.

I think there are some responsibilities that free men have and each must assume some burden in supporting our governmental structures. Not every matter that may be a personal inconvenience should be compensable from the taxpayer's pocket as the courts evolve constitutional law.

We reject, and suggest that Congress should reject, the automatic incorporation doctrine that is similar to, in our view, the 14th amendment incorporation doctrine where all of the Bill of Rights were incorporated through the 14th amendment and made applicable to the States.

We see the *Thiboutot* decision as, in essence, the Court adopting a section 1983 incorporation doctrine whereby section 1983 attorney's fee provisions and, perhaps, standing are vested in suits under the "and laws" language of section 1983, where no such rights were intended by Congress originally. Admittedly, future court decisions may narrow the standing issue to the *Cort* v. *Ash* standard, but no one now knows for sure. Only future expensive litigation will resolve the question.

Frankly, we are concerned where the courts may go with the *Thiboutot* decision and think Congress ought to speak and speak loudly that not all Federal statutes vest private rights of action against local governments in individuals, unless it is so stated or otherwise implied under the *Cort* v. *Ash* test. Mr. Chairman, your bill so states this principle.

We think there ought to be a balancing in defining the compensable rights under section 1983 actions. This objective may not be easy, but—as stated—it is presently virtually impossible for local governments to budget for such losses because risks are not now measurable.

Salt Lake City is presently self-insured, and many other local governmental entities are being forced to go to self-insurance programs because they cannot afford and, in some cases, cannot obtain insurance coverage. In reality, this fact is a product of the fact that there is no way to measure the scope or the cost of the risks that local government now has for its operations because of the *Owens, Monell,* and *Thiboutot* cases.

With regard to the *Thiboutot* decision, again I run the risk of overstating this, but I almost view that case as a Gulf of Tonkin resolution against cities because of its potential for giving the courts power to vest standing to sue on any Federal law, without any consideration of the principles articulated in the *Cort* v. *Ash* decision and because it vests the right to be awarded attorney's fees in such cases. My colleague is going to talk about attorney's fees, but I think that issue is inseparable from consideration of the *Thiboutot* decision. As you are probably aware, or soon will become more aware, the way the courts have interpreted the attorney's fees provision under section 1988—applicable under section 1983 and *Thiboutot* to actions on Federal laws—it is a "heads, the Government loses; tails, the plaintiff wins" arrangement.

Attorney's fees are seldom, if ever, awarded to the Government, and yet they are awarded, on a very liberal basis, to the plaintiffs, sometimes even when the city or the local governmental unit has prevailed in the lawsuit.

Through the incorporation of all Federal statutes under *Thiboutot,* we are incorporating section 1988, and that poses substantial problems on the cost factor for evaluating litigation decisions. Such one-sided risk factors will undoubtedly result in settlements and management decisions based on cost containment, rather than just implementing statutory policy. I think the courts have evolved the attorney's fees section with so-called traditional civil rights or equal protection issues in favor of the plaintiff to encourage litigation of those claims and to encourage officials to give deference to those rights, particularly first amendment rights. That policy does not apply to all Federal laws.

I suggest and submit to Congress that it has the responsibility to define when a plaintiff ought to have standing under its statutes to sue cities, No. 1; and, No. 2: If attorney's fees awards to plaintiffs are desirable—in abrogation of the traditional American rule that each party should bear the cost of their own litigation—Congress should decide that issue on the merits of each such statute and on the policy issues involved in the law under consideration. The law on attorney's fees for vindication of civil rights should not automatically be incorporated to suits on Federal statutes. Thus, Congress should address this inappropriate result of the *Thiboutot* decision.

Third, Senator, I would point out that local governmental units are vitally concerned about where the cases are going and the scope of what kind of Federal laws and what rights under them are going to be incorporated through this "and laws" section of 1983, if the *Thiboutot* decision remains intact.

Just a couple of examples may be illustrative. I do not mean to make a parade of horribles, but just from a local situation that is going on the Salt Lake right now, which leaves us in considerable doubt, may show the nature of these concerns. The Clean Water Act was passed by Congress and amendments were later made concerning the removal of toxic waste from sewer water before it enters the treatment facility.

Salt Lake is presently in the process of passing a city-county ordinance with the assistance and cooperation of the Federal people in charge of that program. The idea is to interpret the Federal regulations related to this law and follow the Federal policy mandate in adopting local law so that we can remove toxic wastes before the effluent from various sources is put into the federally funded sewer and processing plant.

What if the cities interpretations of this law and its regulatory scheme are wrong? What if Salt Lake City follows the Federal people's interpretations, either concerning their regulations or in their interpretations of the law, and subsequently an individual contests those decisions codified in city ordinances as creating an unreasonable burden, placing costs, or interfering with his right to use the sewer system? The city has no good-faith defense that it followed the directions of Federal officials; it is in the position of indemnifying the Federal Government.

Not only can the Federal Government not be sued, but the city will bear the burden of defending the suit, paying the potential damages and—under the present status of the law—the cost of paying attorney's fees.

We have a similar question that arises on a little different issue, and that is one raised by Professor Howard in the article included among the materials we have given you.

He suggested that there is a substantial question as to whether the courts are, subsequently, going to rule that the *Thiboutot* also applies to "burdens" that may be imposed on Federal statutory rights by local law. This is an argument similar, I suppose, to the argument that the commerce clause can permit Congress to reach the selling of a bushel of wheat in-State because it impacts and burdens interstate commerce.

The cities could pass laws or regulations that would burden or otherwise impact on a Federal statutory right. Therefore, under a simple judicial extension of the *Thiboutot* rationale, the cities could also be liable for burdening or impacting Federal rights, even though a local government unit was not acting as an agent for the Federal Government or implementing Federal statute.

A quick example—again to do with our sewer system—is a proposed city ordinance dealing with solid waste. We are in the process of creating a city ordinance that requires restaurants to install certain garbage grinders to remove 85 percent of the pulp in order to meet some Federal guidelines having to do with what they identify as the BOD—the biochemical oxygen demand.

Our innovation is not mandated, yet it may create a burden on the Federal statutory rights. Thus, we could be subjected to liability—we do not know. The city hopes that is not the case. Professor Steinglass has indicated, he does not believe that is where *Thiboutot* is going, but I can tell you, local officials do not know for sure.

Local governmental officials are in a substantial state of concern. Not only may we have to litigate those types of issues, but we might end up paying both sides of the lawsuit. As will be discussed hereafter, those can be substantial costs.

Senator HATCH. Roger, if I could interrupt you for a second—I have got another commitment I have to make. I am wondering if you could summarize. I hate to do this to you, and I want your full statements in the record, but I wonder if you could both summarize for me as shortly as you can so that I can make these other commitments. I did not think we would run this long. I apologize to you, but that is just our life.

Mr. CUTLER. I am sorry. I have probably taken more time than I should have.

Senator HATCH. No, that is no problem. We want to make this record because this is an important issue, and it has not been addressed, and you are doing an excellent job—in fact, a very detailed job—all three of you. I hate to have to move it along or cut it short, but I appreciate what you are doing.

Mr. CUTLER. Local government has gone from absolute immunity to strict liability and from certain exclusion from attorney's fees and responsibility under the "and laws" language of section 1983 to certain inclusion. Also, we have new vistas of uncertain liability, all in about 3 years. In sum, we feel that these ambiguities should be removed and risk and responsibility reasonably balanced. We support your bills.

Senator HATCH. I did not mean that short a summary. [Laughter.]

I got you off the hook really quickly.

Well, all right. If you could summarize as well, Mr. Glink, we would appreciate it.

I apologize to you because I know all three of you have important statements here, and we will get those into the record. Feel free to take the time that you feel you must take, but if you can summarize I would appreciate it because I would like to be here while you testify.

[Letter from the Utah League of Cities and Towns, submitted by Mr. Cutler follows:]

UTAH LEAGUE OF CITIES AND TOWNS,
Salt Lake City, Utah, May 5, 1981.

Hon. ORRIN HATCH,
U.S. Senator, Chairman, Subcommittee on Constitution, Senate Judiciary Committee, Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR HATCH: Last Thursday it was brought to our attention that you are sponsoring two bills—S. 584 and S. 585—that would amend Section 1983 of the Civil Rights Law for the purpose of limiting those types of laws that would trigger a cause of action under Section 1983 to those actions which are violations of the United States Constitution or Statutory Civil Rights Law and to provide municipalities with the "acted in good faith" defense respectively. We further understand that you are interested in amending the Civil Rights Attorney's Fees Awards Act of 1976 in such a way as to limit not only the amount of fees that could be collected but also the type of action against which fees could be awarded. We also understand that the legislation you are proposing along with the proposals of the National League of Cities (NLC) and the National Institute of Municipal Law Officials (NIMLO) are going to be presented to an discussed with the members of your subcommittee on the Constitution Wednesday, May 6, 1981.

After receiving the above information and having the opportunity to review both the NLC and the NIMLO proposals with Cynthia Pols on the NLC staff and Mr. Roger Cutler, City Attorney for Salt Lake City who is also a member of the NIMLO Board of Directors, as well as having the opportunity to discuss your own legislative proposals with Mr. Pete Ormsby on the constitutional subcommittee staff, we feel it is necessary to convey to you the support of the Utah League of Cities and Towns in your attempt to curb the expansion of the power of civil rights litigants by further defining and limiting municipal liability for violations of the Civil Rights Act (42 USC, Section 1983). This is an area of law that we are more than a little concerned about. It is an area of vital importance to the future of local government and its leadership because of the adverse impact the recent decisions of the United States Supreme Court have had on both the fiscal stability of cities and towns and the quality of people who are able to be enticed to serve local government either as an elected or appointed official. It is an increasingly hard and rare occasion to find an individual who is knowingly willing to risk his fortune and his personal reputation for a few moments of glory and at the same time shoulder the liability that is placed upon him for any action he may take while serving as a municipal official. The burden is especially heavy if he is serving in the capacity of a part-time elected official who is essentially donating hundreds of hours of his time to his community and by so doing already is in many cases depriving himself and his family of economic opportunities which he would be taking advantage of as a leader in his community's business and/or professional enterprises.

With regard to the proposals being submitted to your subcommittee by the National League of Cities and the National Institute of Municipal Law Officials, we must report that it is our opinion after having several conversations with Mr. Cutler and others that the proposal being submitted by the National League of Cities does not go far enough in its attempt to correct the problems local government have with Section 1983 and, in fact, in two areas it unnecessarily expands existing law and court decisions in such a way as to actually inflict additional strain on municipal governments' ability to protect themselves from spurious claims.

Based on the information available and understanding we have of the issues presented in the proposals to amend Section 1983 of the Civil Rights Act, it is our belief that the officers and board members of the Utah League of Cities and Towns would support amendments which would accomplish the following:

1. Grant the "good faith defense" concept in equitable actions as well as those actions seeking monetary relief. Because of the interpretation the courts have given to existing laws and the resulting decisions, monetary settlements under actions seeking equity have in some cases had a greater adverse financial impact on the municipal government than some awards made to individuals seeking monetary relief for damage.

2. Extend immunity—both absolute and qualified immunity—to local municipal governments whenever their employees or officials are personally immune. It is unwarranted and naive to believe that providing personal immunity and not corporate immunity does anything but have a chilling affect on the action of the individuals involved, especially the actions of municipal officials. The reluctance to take

action is substantial because the individual knows the entity for which he works or the entity he is serving as an elected official may still be sued and forced to pay an exorbitant fine even if he or she is found innocent. The local official also knows that his performance is being evaluated in relation to either his employment future or his future as an elected official, whichever the case may be. The "deep pockets" concept of monetary awards is abhorrent to our sense of fair play, especially when it is being used to assure the ability of some people to get some monetary award from a municipal government when they could have obtained damages from the individual against whom the original action was brought.

3. Extend to locally elected members of legislative bodies all of the derivative immunities granted members of the United States Congress and State Legislatures. The extent of current liability being borne by municipal officials effectively inhibits legitimate decision-making processes and will continue to do so as long as situations exist whereby locally elected officials have their lives and personal fortunes placed in peril by courts who are all too willing to spend someone elses money, and the attitude of the public at large continue's to be one which fosters the idea that the only way to solve a problem is to "sue 'em in court".

4. Extend both absolute legislative and qualified executive immunity to municipal officials in all actions under Section 1983, regardless of whether the action is for equitable relief or monetary damage.

5. Amend the Civil Rights Attorney's Fees Awards Act of 1976 to severely limit not only the amount of fees that may be awarded but also the laws under which actions are taken. We would agree with the concept that, (1) fees should only be awarded for meritorious cases (cases that are precedent setting and/or important in terms of national impact); (2) that fees awarded for meritorious cases should approximate the market rates in the area where the case originates; and (3) fees should not be awarded at all where the alleged violation is, other than an action seeking relief under protection of the United States Constitution and/or federal Civil Rights Law. The 1976 Act as it is now written not only encourages litigation, it encourages extended litigation.

You will note when comparing the above suggestions for amendments to Section 1983 that our comments favor and, in fact, are supportive of the positions taken by the National Institute of Municipal Law Officials as we understand them to be.

In addition to the above after having several lengthy conversations with Mr. Roger Cutler, it is necessary to further report that we have serious concerns with the following aspects of the National League of Cities' proposal—a copy of which is attached for your use:

1. Under subsection (c)(1) the second sentence begins by saying, "Actionable conduct shall also include. . . ." The objection we have is to the language ". . . conduct shall also include. . . .", because it mandates expansion of existing rule of law and the effect of which is for us to give up the exiting protections that have thus far been carved out for us by the courts. The language in this entire section, particularly subsection (b), fosters spurious claims against a municipality and then shifts the burden of proof from the individual seeking the relief to the municipality charged with the violation. Furthermore, we believe that a municipality is entitled to the defense of "good faith" and should not be held liable in actions at equity as well as actions at law. The National League of Cities' proposal provides for the "good faith" defense only in an action brought at law.

2. Under subsection (c)(3), the National League of Cities' proposal states that "The court shall direct the municipality. . . ." Our disagreement with this language lies in the fact that we do not believe in and we disagree with the concept of taking away the court's discretion to act in a flexible manner through the use of the mandate "shall".

We appreciate the opportunity to provide you with the above comments. The legislation you are working on strikes at the very heart of local governments' relationship with the state and national governments. Our federal system needs strengthening and we believe that one of the best ways to do so is to limit the liability of local officials by amending Section 1983 of the Civil Rights Law. Please know that we are interested in and desirous of continuing to work with you and others—especially representatives of the National League of cities and the National Institute of Municipal Law Officials—in the effort to develop a consensus of opinion that will lead to a successful legislative effort in this most important area of law.

Respectively yours,

Herschel G. Hester III,
Executive Director.

STATEMENT OF MARVIN J. GLINK, CORPORATION COUNSEL OF NAPERVILLE, CHICAGO, ILL.

Mr. GLINK. I will try to shorten it, Mr. Chairman.

I have been in practice for 30 years. For the last 20 years, I have been exclusively in the municipal field. Our firm is a 20-person law firm. We represent exclusively local government in the Chicago metropolitan area.

One of the things I wanted to relate to you and to this subcommittee was that we have helped form self-insurance programs in our communities of municipalities who have faced this dire problem of obtaining proper insurance at reasonable rates and protecting themselves in all of these types of situations, including civil rights.

We represent probably the largest single intergovernmental agency in the United States—31 communities in the metropolitan area that have joined together for a full, complete self-insurance pool. It is known as IRMA. They and the other communities in Illinois are tremendously concerned about this problem.

At the April NIMLO seminar, I delivered a paper relative to the problems of attorney's fees, and I will file that, Mr. Chairman, if I may, as another exhibit for this subcommittee.

Senator HATCH. Without objection, that will be entered into the record with the rest of your exhibits.

Mr. GLINK. I will not go over again the kinds of material that I have covered in that report. That can be available for you and the subcommittee to read.

Suffice to say that our concern over these issues was brought about dramatically by one of the cases that we talk about—the *Westmont* case, or the case that is known as *Entertainment Concepts* v. *Maciejewski.*

The depth of the problem, I think, can be understood even from the fact that there is no correlation or consistency between the awards of attorney's fees.

Just today in the Washington Post, I read of a district judge being angry at the Secretary of Interior and increasing the attorney's fees from $59,500 to $230,400 because they had not paid the fee he had ordered quickly enough. That kind of situation can occur and does occur from time to time in the award of these attorney's fees.

The lodestar, as the courts call it, is really the base fee that you and I as attorneys would be entitled to in representing a client based on an hourly rate that is prevailing in the area. That is the starting point. And, from there, they usually add a multiplier.

In the *Copeland* case which we talk about—a district court decision—a fee of $160,000 was granted in a $33,000 recovery case. I think the dissent aptly described the majority's lodestar as saying: "It's up, up, and away." That is what we are seeing all the time.

In my own 7th circuit, a $500 recovery takes a $6,000 attorney's fee.

Senator HATCH. Professor Abernathy, I would like to get a copy of your casebook so that I can, when I get out of the Senate, make some of these fees. This is just fantastic.

Mr. GLINK. They are extraordinary.

Senator HATCH. You are saying that this is a lawyer's relief bill—not the bill but the procedure?

Mr. GLINK. It is being used for that, Mr. Chairman.

Senator HATCH. I know, of course, that you do not blame the lawyers here, you are blaming the judges.

Mr. GLINK. I am blaming the system, I think.

Senator HATCH. OK. I am just being sarcastic.

One of the problems we have had to sit through is better than 200 judges over the last 2 years, a number of whom came and said they were judicial activists. How do you stop them from being confirmed because they are judicial activists? But that is what is wrong with our country. We have got too many of these people who are making law and legislating from the bench rather than complying with the law and enforcing it.

Mr. GLINK. We are finding that in situations where there is representation by legal clinics or foundations where there are Federal funds supporting them, they are entitled to also the attorney's fees, and not only attorney's fees that are at normal hourly rates but at the increased amount determined by the courts.

Senator HATCH. You are not talking about our national Legal Services Corporation, are you?

Mr. GLINK. I am talking about something—as an example, the Northwestern Legal Foundation and a case I was involved in involving one of my communities, the village of Bridgeview. It is cited as *U.S. Labor Party* v. *Oremus*.

All we were doing was enforcing State law which prohibited soliciting on the streets. I was named a defendant personally because I wrote an opinion letter to the chief of police telling him he should enforce State law.

We won the case preliminarily. The motion for a preliminary injunction was denied. They took the case to the court of appeals. We won there. On the application for a permanent injunction, we won, and again they took it to the court of appeals, and we won again.

That simple little exercise for my little community of Bridgeview of 12,000 people cost them $16,000 in fees to defend that case, and we won it all the way. The equity is not there.

The equity is not there for municipalities when we win, because either we are discouraged or told informally by the courts not to apply for fees, or they may have been able to make a cause of action and therefore they were not going to entertain our suggestion for fees, or the plaintiff is a person that we could never recover from at all. So the inequity is that we have to spend these thousands of dollars defending these cases.

I was prepared also, Mr. Chairman, to talk about some other unique cases, if you wanted to hear them. I think that, because of the hour and because of your problem, I will submit if I may, a summary of some of these unique cases.

One of them—and I had not heard it until today—almost paralleled the case from South Carolina of police responding to a call from another community for assistance, and all of a sudden they were included in a civil rights case, and we have to defend it in order to get out.

Senator HATCH. Do you have any statistics on how many of these cases are won by the defendant municipalities? Do any of you have any statistics on that, or is there any way that NIMLO could put those together for us?

Mr. GLINK. Yes, sir.

Senator HATCH. You see, I think those statistics would be important, too. If these amount to a lot of nuisance lawsuits at high cost—you ought to have the statistics on how many of them are won and at what cost to the municipality.

Mr. GLINK. The cost of defense is very, very high because most of us cannot get out of a case on a motion to dismiss. This is the real world. The Federal judges do not want to entertain a motion to dismiss because if the allegations—and you know, the pleadings can be very broad—even support the possibility of a claim, they are going to keep the case at least until after all depositions are taken, until there is enough evidence that you can file a motion for a summary judgment.

That usually means to the defending municipality a great deal of expense and time in preparing a case and defending it, and, before you know it, we have run up thousands of dollars in defense on cases that we believe are truly frivolous—basic personal injury cases, basic zoning cases, basic ordinance enforcement cases, all of which belong in the State courts and have nothing to do with the violation of civil rights, but they make a civil rights claim out of them, and they wind up in the Federal courts.

If I could take just a moment or two more—and I support your bill wholeheartedly, as do the people in Illinois that I represent—I would suggest that the bill could be expanded further. As we have been receiving reports from other attorneys, a dollar limit on 1983 recovery might be considered, or some uniform statute of limitations—perhaps 2 years. We now have varying statutes, depending on the judge and the circuit.

There should be some form of a claims notice to local government, as we have in basic tort law, perhaps within 6 months, so that we know that there may be a cause of action that is accruing. Sometimes we get these things from 4 or 5 years ago, and we have no idea that there is such a cause of action.

A clarification and reaffirmation of *Monell* is required that the respondeat superior does not impart liability where our employee only performs a single act and it is not pursuant to any statute, ordinance, rule, regulation, or custom and usage.

We need to know what is the standard of care. Is it a negligent standard or willful and wanton standard? And how broad is the scope or the application of the Civil Rights Act?

As I mentioned, the zoning ordinance in that *Maciejewski* case—all my community did was pass two ordinances. There was never an attempt to enforce the ordinances. No damages were shown or proven, and yet we stand liable to up to $30,000 in attorney's fees by the court of appeals in the 7th circuit, and the Supreme Court would not review that case.

And, of course, finally, the question of punitive damages is still open and needs, perhaps, to be addressed by this subcommittee. There is a case pending right now in the U.S. Supreme Court on the question of whether or not punitive damages may or may not be applicable.

I would just conclude—and, again, it has been a great honor to be here—that I am here because I have clients—municipalities, citizens, taxpayers—who are greatly concerned, and I think they need to be protected, and they have not been.

We thank you very much for your attention.

Senator HATCH. Thank you. Without objection, we will insert your prepared text and the additional materials you have supplied and will supply to the subcommittee at this point.

[Material supplied follows:]

THE NEXUS BETWEEN THE ATTORNEY FEES AWARD AND DEFENDANT'S LIABILITY

By

Marvin J. Glink
Ancel, Glink, Diamond, Murphy & Cope, P.C.

NIMLO SEMINAR, APRIL 12-14, 1981

What is the nexus between the attorney fees award and defendant's liability in civil rights actions? Nexus is defined in Webster's New World Dictionary, College Edition, as a connection, tie, or link. Using any of those definitions, based upon the case of Entertainment Concepts, Inc. v. Maciejewski, 631 F.2d 497, cert denied 1981, there is no nexus.

In Maciejewski, a Section 1983 suit was filed against the Mayor and the Board of Trustees of the Village of Westmont, Illinois by Entertainment Concepts, Inc., a corporation in the business of operating movie theaters. Plaintiff exhibited motion pictures in the Village of Westmont since December 22, 1978, and on September 21, 1979, began advertising on its marquee, "Coming Soon, Adult Movies." In 1978, the Board of Trustees of the Village amended their municipal code to add a section which provided for a movie review committee to review motion pictures to determine whether or not they are obscene. The ordinance also empowered the Mayor to suspend the motion picture license of an exhibitor of obscene motion pictures. On October 1, 1979, the Board of Trustees amended their zoning ordinance to create a new category, "Adult Movie Indoor Theaters," designating that category as a "special use."

Entertainment Concepts attacked both ordinances, alleging they were adopted to prevent the exhibition of certain type of film. The members of the movie review committee were also named as defendants. At the time that Entertainment Concepts filed suit, the Village officials had made no attempt to enforce either of the ordinances and plaintiff had not filed an application for special use permit under the zoning ordinance.

At a hearing before the district court at which no evidence was offered by plaintiff that any action had been taken to enforce the ordinances or that the motion picture license had ever been suspended, the court permanently enjoined the enforcement of the two challenged ordinances and specifically denied any other relief, finding that plaintiff had "failed to prove that there is any need for a declaratory judgment * * * or that plaintiff suffered any monetary damages."

On appeal by both parties, the Court of Appeals held that the ordinances were unconstitutional and reversed the district court on the question of attorney's fees, holding that Congress intended the Civil Rights Attorney's Fees Award Act to abrogate any immunity possessed by the village officials, and remanded the cause for framing of an appropriate fee award.

On behalf of the village officials, we filed a petition for certiorari. In our opinion, the Court of Appeals decision conflicted with the decision of the Supreme Court in Supreme Court of Virginia v. Consumers Union of the United States, ________U.S. ________, 100 S.Ct. 1967,(1980). In Consumers Union, the district court ordered the Supreme Court of Virginia and its Chief Justice to pay the plaintiff's attorney's fees. The U.S. Supreme Court, examining the actions of the Virginia Supreme Court, held their actions as legislative and that the court and its members must be immune from suit when acting in their legislative capacity. 100 S.Ct. at 1975. Our petition for certiorari pointed out that in Maciejewski, we also had a legislative act of the village board, where there had been no attempt to enforce the ordinances and where no damages had been presented to the trial court. Our petition further pointed out to the U.S. Supreme Court that the Court of Appeals ruling was contrary to Section 1988 in that it mandated an award of fees in the absence of any liability in law or fact for violation of civil rights. And, further, that any discretion by the trial court was removed by the Court of Appeals decision that fees should be awarded "almost as a matter of course." 631 F.2d 506. The Supreme Court refused to review the case.

We believe the Seventh Circuit decision clearly reflects a conflict in the circuits. In the case of Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, (8th Cir. 1980), the Eighth Circuit held that an attack on a zoning ordinance was an attack on a legislative act, and the city directors were absolutely immune for liability for its passage. The court then went on and held that the citizens who had opposed the plaintiff developer in a plan to build a high rise apartment complex, where they were aided by the city, were likewise absolutely immune from Section 1983 damage liability. In another zoning type case, the Fourth Circuit in Bruce v. Riddle, 631 F.2d 272, 1980, held that city council members had absolute legislative immunity when they passed the zoning ordinance, stating that the immunity is derived from the Eleventh Amendment and common law sovereign immunity. The fact that the council members met privately with influential citizens prior to the amendment of the zoning ordinances were not acts which occurred outside the scope of their legislative duties and they did not lose immunity from Section 1983 liability.

The apparent conflict between the circuits and indeed the conflict in the Supreme Court itself is further indicated by a decision of the U.S. Supreme Court to refuse to hear arguments from a group of Pennsylvania judges on January 12, 1981. The judges were charged with neglecting to tell indigent defendants they were entitled to have a lawyer. A district court dismissed the case for lack of controversy and denied a request for approximately $4,600 in attorney's fees. The Third Circuit reversed the district court and held although the indigents did not win the suit, they prevailed by obtaining the remedy they sought. In answering the petition for certiorari, the indigents argued there was no final decision in the lower court so the issue was not ready for Supreme Court review. The same argument was presented to the Supreme Court in Maciejewski. A number of states filed briefs with the Supreme Court urging the review of the decision, but again, the U.S. Supreme Court declined. The case is Ayoob v. Morrison, 49 L.W. 3494 (January 12, 1981). At the present time, Maciejewski is back in the district court where applications for fees are pending in excess of $30,000.

While in no way intending to be exhaustive on the question of the award of attorney's fees, there are a few significant cases that should be commented on which have occurred during the last year and a half. In Custom v. Quern, 482 F.Supp. 1000, January, 1980, the U.S. District Court, N.D. Illinois, E.D. held that the plaintiff's attorneys were entitled to a counsel fee award in a Section 1983 action brought against the Illinois Department of Public Aid because of unreasonable delays in processing applications under the Illinois General Assistance Program. This award was authorized even though the attorneys worked for a non-profit legal aid organization, and a consent agreement was entered into between the parties. The court held the fee was to be measured by the market price of the services that private attorneys would have provided, and the court must consider both compensatory and value aspects of such an award. The trial court further held that the Eleventh Amendment did not bar an award against state government. In Muscare v. Quinn, 614 F.2d 577, February, 1980, the Seventh Circuit held the plaintiff was entitled to attorney's fees on his successful claim that he was denied due process, but not on the unsuccessful claim that the grooming regulation of the city fire department was unconstitutional. The court further held that the factors for determining the reasonableness of the attorney fee, as set out in the code of professional responsibility of the American Bar Association were pertinent and to be considered in any award. The determination of a reasonable fee is to be left to the sound discretion of the trial court. In Love v. Mayor, City of Cheyenne, Wyo., 620 F.2d 235, April, 1980, the Tenth Circuit held that an award of attorney's fees in a civil rights case where the plaintiff challenged an ordinance as unconstitutional and prevailed under First Amendment principles after attempts to negotiate had failed, was warranted, aside from the fact that good faith on the part of the defendant was found in the record. The court held that good faith was not a reason to deny attorney's fees in a civil rights case. The court also held that the plaintiff was entitled to attorney's fees for work done on the appeal and in resolving the fee issue itself.

In Watkins v. Mobile Housing Board, 632 F.2d 565, December, 1980, the Fiftn Circuit heard an appeal where the trial court award of attorney's fees was reduced in a claim of violation of due process and regulations of the Department of Housing and Urban Development. The original award of approximately $4,600 was reduced in a final judgment to about half. The Court of Appeals reversed since the trial court's decision to reduce the attorney's fees was insufficiently explained and the court further held that in setting attorney's fees, the fact that the prevailing party was represented by a public service firm or association funded by public funds was irrelevant. The court enunciated the test as to prevailing party being whether the plaintiff has received substantially the relief requested or has been successful on the central issue. In Sherkow v. State of Wisconsin, Department of Public Instruction, 630 F.2d 498, August, 1980, the Seventh Circuit was reviewing a sex discrimination claim and upheld the trial court's finding that sex discrimination occurred and that the state was required to appoint the plaintiff to the first vacancy occurring in the work force. The court further held that once it has been determined that discrimination based on sex has occurred, then the plaintiff is entitled to recover for all time reasonably spent on the matter, even if the plaintiff prevails in part but not as to her entire claim, and that the recovery of attorney's fees and expenses need not be reduced accordingly. In Copeland v. Marshall, _______F.2d_________, the Court of Appeals D.C., 49 L.W. 2159, affirmed a fee of $160,000 where the plaintiffs obtained about $33,000 in back pay. The court denied the proposal of the U.S. Government that the fee should be the actual cost to the law firm plus a reasonable and controlable profit. The court held the fee should be based on the market value and not on some notion of "cost." The court further found that the litigation sought and obtained substantial equitable relief and that this fact was highly relevant to the award of a large fee. The dissent stated that the majority's "lodestar" opinion is easy to discern. "It is up, up, and away!" In another case involving an award to a legal services organization, the Seventh Circuit in Mary Ann Crystal v. Ramsden, _______F.2d_________, November, 1980, awarded attorney's fees of $20,125 where one resident recovered $5,301 and another resident recovered $1,601 in a civil rights suit seeking money damages for disciplinary actions violative of the Eighth Amendment to juvenile correctional residents. On remand, the district court was directed to recompute the allowance so as to eliminate a 40% reduction in rates for the attorneys on account of overhead, imposed by the District Court because the attorneys were employed on salary by an entity financed by government and private contributions.

The awards go on. In Furtado v. Bishop, 635 F.2d 915, December, 1980, attorney's fees in the amount of nearly $23,000 were awarded in a suit brought by state prisoners against prison officials and the verdicts against the officials totalled $27,000. The court held the rule of one-third of total recovery could not be used as a ceiling or as a floor for the award of attorney's fees. In Coop v. City of South Bend, 635 F.2d 652, December, 1980, the Seventh Circuit awarded $6,000 in fees notwithstanding that plaintiffs recovered only $510 compensatory damages, holding that the purpose of the Civil Rights Attorney's Fees statute is to permit and encourage the redress of civil rights violations of victims. Again, the Seventh Circuit in Murphy v. Kolovitz, 635 F.2d 662, January, 1981, held that a plaintiff who was unsuccessful on a claim of false arrest but successful on a claim of unnecessary physical abuse was the prevailing party and entitled to attorney's fees. Further, the court held that existence of circumstances which would render an award of attorney's fees to a prevailing party as unjust should be identified when the attorney's fees are denied to the prevailing party. In Skehan v. Board of Trustees of Bloomsburg State College, 501 F.Supp. 1360, January, 1981, the U.S. District Court, N.D. Pennsylvania held that where a plaintiff lost in his first amendment claim but won on a due process portion of the claim relating to a pretermination hearing, he was still entitled to attorney's fees. The fees, however, were not awarded for work done by the attorneys which were not reasonably supportive of the plaintiff's civil rights claim. In determining the award the court expressed the familiar litany that if an award is appropriate the court must calculate the "lodestar" amount for each attorney who represented the plaintiff and then the court must determine whether the lodestar should be adjusted upwards or downwards. Of course, the "lodestar" is the hours of compensible time multiplied by a reasonable hourly rate. To modify the lodestar the court held that consideration should be given to the contingent nature of the litigation and the quality of counsel's work. Needless to say, in most cases, the lodestar is increased. In Jones v. Diamond, 636 F.2d 1364, January, 1981, the Fifth Circuit, in a case brought by prisoners held in a county jail challenging the conditions of their confinement and seeking damages, held that racial segregation, overcrowding, unsanitary conditions, etc., were indeed violations of the prisoners' constitutional rights, although it upheld the trial judge relative to a solitary confinement issue. The court held that the plaintiffs were entitled to appropriate attorney's fees, costs and witness fees. The award of attorney's fees was justified notwithstanding that the 1976 Act was passed after the litigation had commenced and notwithstanding that the litigants did not succeed on all of the claims asserted. Further, the court said that lawyers bringing civil rights litigation are entitled to be paid more when successful than those who are assured of compensation regardless of the result. The court also held that the prisoners were entitled to expert witness fees.

The number of cases involving denial of attorney's fees, compared to those cases where fees are awarded, is mightly slim. In Bean v. Gladney, 621 F.2d 1331, July, 1980, the Fifth Circuit denied attorney's fees against the city and the county where they were dismissed from the suit and where a judgment was rendered on a jury verdict against two law enforcement officers. In this case, there was no vicarious liability even though the employees were held liable. The attorney's fees awarded were apportioned according to the extent of their liability against the various arrestees. In White v. New Hampshire Department of Employment Security, 629 F.2d 697, 1980, the First Circuit held that a request for attorney's fees award must be made prior to the entry of the judgment or within a ten day period prescribed by Federal Rule 59(e). An application had been made four and a half months after the district court approved a consent decree. The court held that the application was not timely and that a Section 1988 request was not a collateral or independent claim free of the time limits related to the entry of judgment in the underlying dispute. The court acknowledged that the Fifth Circuit held that attorney's fees under Section 1988 were "costs" and not subject to any time limitation. Knighton v. Watkins, 616 F.2d 795 (C.A. 5, 1980). In International Society for Krishna Consciousness, Inc. v. City of Fvanston, the Appellate Court, First District of Illinois, 44 Ill. Dec. 664, 411. N.E.2d 1030, denied attorney's fees in a civil rights action filed in state court. The trial court found that the city had violated procedural due process rights and awarded minimal nominal damages and ordered the issuance of a special use permit. The Appellate Court found that the defendant had not violated the plaintiff's rights in any malicious or reckless manner and that nominal damages should not have been recoverable where it was not shown that the city had acted intentionally, maliciously or recklessly. The court then found that the plaintiff was not a prevailing party and entitled to attorney's fees.

What happens in the situation where the city wins? If the municipality prevails, in theory it should likewise recover its fees. Unfortunately, this does not occur often. In Terket v. Lund, 623 F.2d 29, June, 1980, the Seventh Circuit affirmed an award of attorney's fees against a plaintiff where the trial court had granted the motion for summary judgment. The court held that the award of attorney's fees against the plaintiff could not be reviewed on appeal since there was no notice of an appeal specifying an appeal of the case in chief. The court of appeals held that a timely notice of appeal from the judgment or order was mandatory and jurisdictional even though the district court could proceed with attorney fee motions after an appeal had been taken from the underlying judgment, and then if any party was dissatisfied with the court's ruling, it could file an appeal and consolidate with the pending appeal of the case on the merits. In Bennett v. Cramer, 495 F.Supp. 191, July, 1980, the U.S. District Court, E.D. Wisconsin denied a city police officer's motion for attorney fees after the civil rights action against the officer had been dismissed. The court held that in creating private causes of action under the civil rights statute, Congress intended to have plaintiffs take an active role in safeguarding constitutional guarantees and a prevailing defendant is not to be awarded such fees unless the plaintiff's claim was frivolous, unreasonable or groundless, or unless the plaintiff continued to litigate after the claim clearly became so. Notwithstanding the fact that the court ruled, as a matter of law, that the plaintiff's loss of vision and loss of wages were unrelated to the incident, the court held there was sufficient evidence on the question of excessive force to allow the case to go to the jury. Therefore, the police officer was not entitled to an award of attorney's fees. In Ellis v. Cassidy, 625 F.2d 227, August, 1980, the Ninth Circuit upheld a dismissal of a plaintiff's civil rights and conspiracy case and upheld an award of attorney's fees to the defendants. The court held that the district court could properly conclude that the plaintiff's claims were frivolous or meritless and therefore defendants were entitled to attorney's fees. The fact that some of the defendants were covered by insurance, or were themselves attorneys, did not preclude an award of attorney's fees. The test enunciated by the court of appeals appears to be that the plaintiff has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Finally, a decision is reported in the National Law Journal from the Tenth Circuit, on January 5, 1981. In Nulf v. International Paper Company, 79-1008, the Court of Appeals denied an award in a Title VII discrimination suit even though it affirmed the dismissal of the claim. The court cited Christiansburg

Garment Company v. EEOC, 434 U.S. 412 (1978) to the effect that the plaintiff should not be assessed his opponent's attorney's fees unless the court finds the claim is "frivolous, unreasonable or groundless or that the plaintiff continued to litigate after it clearly became so." The court stated that the defendant itself acknowledged in a pretrial motion that there were matters which only a trial could resolve so the plaintiff's action was not so groundless as to justify an award of attorney's fees.

It appears to your author that there is indeed a need for an amendment to the Civil Rights Attorney's Fees Awards Act in addition to the legislation introduced by Senator Hatch, S. 584 and S. 585. Obviously, litigants in a civil rights case are not treated the same. The issue of an award of fees where there are no damages should be eliminated. Litigation should not be encouraged by outrageously large fee awards. Certainly no award in Section 1988 cases should exceed the prevailing hourly rate in effect in the given area. We are hopeful that Senator Hatch and Congress will give consideration to the attorney fee problem in addition to the other existing civil rights difficulties.

Another disturbing factor about attorney's fees awards is that the courts appear to have lost sight of the "private attorney general" rationale which underlies Section 1988, and have awarded attorney's fees without regard either for the constitutional right purportedly protected in the action or for the scope of relief granted.

This is especially true in zoning cases such as Entertainment Concepts, in which the plaintiffs sought relief exclusively for themselves, suffered no damages and obtained the same legal "go-ahead" that they might very well have obtained had they applied for a permit and followed Westmont's administrative procedures. Thus, the court of appeals has mandated an award of attorney's fees for what really was nothing more than a zoning application made to the federal court rather than to the Village of Westmont. The tendency of the courts to reward such self-centered actions can do little to further constitutional goals while it does much to undermine the operations of local governments.

One of the factors that militates in favor of Congressional action regarding attorney's fees is that the awards of attorney's fees without regard for the degree or scope of relief obtained, amount of actual expense incurred, or liability (or absence thereof) of the defendants appears to be consistent with the Supreme Court's reasoning. Furthmore, the Supreme Court's refusal to consider such cases as Entertainment Concepts and Morrison v. Ayoob, indicate the Court's steadfastness in its belief.

Respectfully submitted,

Marvin J. Glink
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Senator **Hatch**. I think all five of you witnesses today have done a signal service to the Senate in bringing to our attention the extent to which these problems really lie. We have had diverse testimony, which we will carefully scrutinize.

As you know, when we file these bills, we do the best we can to put them together in a reasonable and fair fashion, and we have had testimony on both sides of this issue today that will certainly cause us to reexamine the bills.

In particular, you people who represent municipalities have been very helpful in helping us to understand some of the practical problems that arise, apart from the esoteric and theoretical problems that we like to talk about here in the Congress, sometimes for years on end. So we are very grateful to have you here.

I would suggest that it would be a wise thing for NIMLO to try and do more statistical analyses of this and to document it even more. You have done plenty, but document even more so that we can have the true facts in this matter and then try and make what is the best decision to assist the taxpayers and municipalities while, at the same time, protecting the constitutional and other civil rights.

We all agree that we do not want anybody's civil rights to be violated. On the other hand, there are some tradeoffs that just have to be made in a normal and free society. We just want to make sure that justice is done.

We appreciate the efforts you have put forth and really have appreciated the testimony you have brought here today.

We are going to have another day of hearings tomorrow morning, and we will recess until that time. Thank you so much.

[Whereupon, at 4:15 p.m., the hearing was recessed, to reconvene the following morning.]

MUNICIPAL LIABILITY UNDER 42 U.S.C. 1983

THURSDAY, MAY 7, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:52 a.m., in room 2228, Dirksen Senate Office Building, Senator Orrin Hatch (chairman of the subcommittee) presiding.

Present: Senators Hatch, Grassley, and DeConcini.

Staff present: Steve Markman, general counsel; Peter Ormsby, professional staff member; and Kim Beal, assistant clerk.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, AND CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. The subcommittee will be in order.

I apologize for being late, and I can only stay a minute. However, we do want to have this record built because this is such an important issue in our country today.

The purpose of this hearing is to continue to consider the extent of municipal liability under the Civil Rights Act of 1871. The subcommittee began hearings on this subject yesterday, as we all know.

The Civil Rights Act of 1871, which is now codified as 42 U.S.C. 1983, was passed during the postwar reconstruction era to protect newly freed blacks from violations of rights secured by the "Constitution and laws." Section 1983 has been an important remedy for individuals whose constitutional and civil rights have been violated by those acting under the color of State law. I feel that section 1983 should continue to play that important role, but I also feel strongly that recent developments in section 1983 litigation are creating tremendous burdens on State and local governments which cannot be justified as civil rights protection.

The effect of recent Supreme Court decisions in section 1983 litigation, along with the effects of the Civil Rights Attorney's Fees Awards Act of 1976, has created a drain on the treasuries of State and local governments and has hampered their ability to serve the public. I introduced S. 584 and S. 585 to counteract the effect of the Supreme Court's decisions to expand municipal liability in *Maine* v. *Thiboutot* and *Owen* v. *City of Independence.* I have received a great deal of bipartisan support for my bills from State and local governments across the country.

Yesterday the subcommittee received excellent testimony. Prof. Charles Abernathy, who teaches civil rights law at Georgetown

University, testified that S. 584 and S. 585, with certain modifications, were acceptable and reasonable approaches. Prof. Steve Steinglass, representing the National Legal Aid and Defender Association, testified in opposition to both S. 584 and S. 585.

The National Institute of Municipal Law Officers was represented by a panel of two city attorneys and one attorney who represents a wide variety of cities. The panel presented data collected by NIMLO from cities across the country which demonstrate the adverse impact section 1983 litigation is having on municipalities. The panel also related examples of the severe problems caused by questionable section 1983 cases in their own cities.

I look forward with great anticipation to reading today's record. I would also like to mention that the subcommittee will further consider this issue in two more hearings this summer.

I apologize again for being late, but I had to make a speech before 6,000 handicapped people who are here celebrating National Handicapped Day at the Washington Hilton.

I am the floor leader of the Pauken nomination which is on the floor of the Senate right now. Senator Percy is covering for me until I can get there.

Therefore, I would like to introduce the witnesses and make the record today. It is crucial that we make this record. I ask your forgiveness that I am going to ask staff to continue to make this record. We will pay attention to it. The important thing is that the record is made on both sides of this issue and, if this legislation needs to be corrected, we certainly want to do that. I understand from staff that Senator DeConcini will be here in about 5 minutes to continue these hearings.

The witnesses today will be Thomas J. Madden, who is currently with the law firm of Kaye, Scholar, Fierman, Hays & Handler. He served as general counsel of the Law Enforcement Assistance Administration, U.S. Department of Justice from 1972 to 1980.

The second witness will be Mr. J. Joseph Curran, who is a State senator in Maryland. He is representing the National Conference of State Legislatures.

Our third witness will be Althea Simmons. She is the Washington director for the National Association for the Advancement of Colored People. We are very pleased to hear from her today as well.

Mr. George D. Brown, who is a professor of law at Boston College Law School specializing in intergovernmental relations, was scheduled to be our last witness. Unfortunately, he is seriously ill and was advised by his doctor not to leave his bed, much less leave Boston.

In his written testimony Professor Brown argues strongly in support of S. 584 for important legal and policy considerations. I highly commend his well-written analysis. Without objection, we will make his written statement a part of this record.

[Material to be supplied follows:]

Testimony by Professor George D. Brown, Boston College Law School, on § 584, before the Senate Judiciary Subcommittee on the Constitution, May 7, 1981.

I. Introduction

Mr. Chairman, members of the Subcommittee, my name is George D. Brown, and I am a Professor of Law at Boston College Law School. I appreciate the opportunity to testify at these important hearings. My prepared statement deals with S. 584 and with the Maine v. Thiboutot decision, which it seeks to overturn. My testimony approaches these issues largely from an intergovernmental perspective. That may seem surprising to some. After all, these hearings deal, in part, with such arcane concepts as implied, or express, causes, or rights, of action. Laymen might conclude that we are talking about "legal technicalities," albeit important ones. But these hearings transcend those issues, and bring us face to face with profound questions about the nature of our federal system.

These are hearings on federalism. They illustrate the enduring truth of Woodrow Wilson's observation that the distribution of power between the federal government and the states cannot "be settled by the opinion of any one generation because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question."

The Thiboutot decision is a dramatic example of one major new question: the role of the courts in grant programs. The fact that every suit involving a federal grant is now a civil rights suit, triggering all the consequences of 42 U.S.C. §§ 1983 and 1988, has profound consequences for the operation of our system of intergovernmental aid. I believe that the negative consequences outweigh the positive ones, and will discuss this later in my testimony. But, first, I would like to remind the Subcommittee that Thiboutot does not stand alone. The § 1983 cases and those generally grouped together under the questionable label of "federal common law," raise the question of whether the federal courts might evolve into courts of general jurisdiction. (It must be acknowledged that Thiboutot was a relatively rare example of a § 1983 action brought in state court. That may have been because of the jurisdictional amount requirement which Congress has abolished.)

Such a development would run counter to our constitutional tradition. Let me quote, in this respect, from Justice Brandeis' opinion in Erie Railroad Company v. Tompkins, 304 U.S. 64, 78 (1978). "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.... There is no general federal common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." That statement represents one concept of federalism. The activist view which underlies the majority opinion in Thiboutot represents, I submit, a quite different concept. The point

I am making is that there are important parallels between controversies over the proper role of the federal judiciary, and controversies over the proper allocation of power in grant programs. Thiboutot forces us to confront both sets of issues. Let us turn, first, to the decision itself.

II. Thiboutot - Making it Look Easy.

A. The Decision.

Maine v. Thiboutot, 100 S.Ct. 2502 (1980), involved a challenge by welfare recepients to a reduction in their payments, which they asserted violated a federal statute. The action was brought in state court, resulting in a ruling favorable to plaintffs. On certiorari the state sought review of a ruling by its Supreme Judicial Court that plaintiffs were entitled to attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976. According to the Supreme Court the case presented two issues "(1) whether § 1983 encompasses claims based on purely statutory violations of federal law, and (2) if so, whether attorney's fees under § 1988 may be awarded to the prevailing party in such an action." In a somewhat cursory opinion, Justice Brennan, writing for a six man majority, answered both questions in the affirmative.

In resolving the coverage issue he emphasized the "plain language" of § 1983, i.e., its reference to "laws," in addition to the Constitution. He also relied on numerous cases such as Edelman v. Jordan, 415 U.S. 651 (1974), which appeared to rest on the premise that § 1983 extended to statutory claims. Finally, he analyzed the legislative history as inconclusive, arguing that when Congress added the words "and laws" to § 1983's predecessor it might have envisaged only equal rights laws, or it might have had a broader purpose.

As for attorney's fees, having decided that the original challenge was a § 1983 action, Justice Brennan invoked the plain language of § 1988 to affirm the holding that an award was proper ("Since we held that this statutory action is properly brought under § 1983, and since § 1988 makes no exception for statutory 1983 actions, § 1988 plainly applies to this suit.")

In a sharp dissent Justice Powell chastized the majority for deciding the matter "almost casually," and took issue with them both on legislative history and on the weight of prior decisions. Of particular significance for this testimony is his elaboration of the serious policy and programmatic arguments against extending § 1983 to all statutory claims. He noted that states and localitites are engaged in "literally hundreds" of cooperative programs with the federal government. He emphasized the broad scope of grant programs, and predicted a vast increase in third party grant litigation.

Part of Justice Powell's objection to this impact of Thiboutot rested on federalism grounds: the spectre of the federal courts overseeing a broad range of state and local activities. He was also disturbed by the potential for a vast increase in damage claims against governmental grantees and their officials for violations of grant conditions. In the case of municipalitites, he noted that the combined effect of Thiboutot and Owen v. City of Independence, which is also the subject of today's hearing, could be strict liability for such violations.

B. The Problems.

Justice Powell's arguments have considerable force. Professor A.E. Dick Howard was quoted in Time as saying, "I have problems with taking a statute aimed at discrimination against blacks at a time when government didn't care about handing out benefits, and applying it 100 years later in a totally different age."

As far as precedent is concerned, if the matter were as clear as the majority thinks, one wonders why the lower courts in scores, perhaps hundreds, of cases have engaged in painstaking analysis to determine whether a cause of action could be implied under a particular grant statute. Whenever the defendant was a state or local grantee it would seem that the plaintiff could simply have invoked § 1983 as an express cause of action. It is hard to believe that the lower courts, and litigants, simply missed the point. Indeed, the Supreme Court itself seemed to treat the issue as open in the 1979 case. Southeastern Community College v. Davis, 442 U.S. 397, 404, n.5 (1979). (It is true, however, that a number of lower courts had found a § 1983 cause of action in grant cases.)

There is also a serious separation of powers problem with the Thiboutot analysis. The Court's result takes away, retroactively, the remedial issue from the Congresses which have enacted some 500 grant programs. It is important to recognize that Congress has, on occasion, grappled with the question of third party challenges to grantee practices. The best example is the 1976 amendments to the State and Local Fiscal Assistance Act of 1972 (General Revenue Sharing.) Congress was dissatisfied with the Office of Revenue Sharing's administration of the program and with inconsistent court decisions on the ability of third parties to sue. The amendments establish a complaint mechanism, and provide for a private action as follows:

> "Whenever a state government or a unit of local government, or any officer or employee thereof acting in an official capacity, has engaged or is engaging in any act or practice prohibited by this Act, upon exhaustion of administrative remedies, a civil action may be instituted by the person aggrieved in an appropriate United States district court or in a State court of general jurisdiction."

It is not clear why Congress bothered to provide for private suits if, as Justice Brennan said in Thiboutot, it was well aware of the Court's "many pronouncements on the scope of § 1983."

Thiboutot could have particularly disturbing results in situations where Congress had decided against allowing third party grant suits. A case in point may be the Mental Health Systems Act of 1980. The legislation which passed the Senate contained a bill of rights for persons in programs or facilities subject to the prepared law, and provided expressly for a private civil action to enforce those rights. The House legislation had no bill of rights at all. The Conference Committee produced a compromise: a bill of rights section, but no provision for judicial enforcement. If Thiboutot means what it says, that compromise is a nullity insofar as any facility which operates under color of state law is concerned. Section 1983 provides a cause of action for violations by such facilities of the bill of rights no matter what Congress wanted or did not want.

III. Plain Language and Stare Decisis -- Does Thiboutot Mean What It Says?

A. Plain Meaning.

It is hard to read Thiboutot as standing for anything other than the broad proposition that § 1983 provides a cause of action for violations of all federal statutes. Yet, two weeks before the decision the Court granted certiorari in Pennhurst State School and Hospital v. Halderman, 100 S.Ct. 2984 (1980), and asked the parties to brief the issue of the applicability of § 1983 to a statutory claim in that case. This action led to speculation that the Court might be willing to rethink, or at least narrow, the seemingly clear holding of Thiboutot. This possibility seems remote, however, after the recent decision in Cuyler v. Adams, 49 U.S.L.W. 4105 (U.S. Jan. 21, 1981.) That case involved prisoners' rights under the Interstate Agreement on Detainers, and whether those rights are governed by federal law. Justice Brennan, for a seven man majority, held that federal law governed, and that prisoners are not required to forfeit any pre-existing rights that they may have under state or federal law to challenge their transfer to another state. He concluded his opinion as follows: "[R]espondent... has therefore stated a claim for relief under 42 U.S.C. § 1983 for the asserted violation by state officials of the terms of the Detainer agreement. See Maine v. Thiboutot ____ U.S. ____ (1980)." On April 20 the Court finally handed down an opinion in Pennhurst. It was primarily a merits decision. However, the threshold issues were addressed, somewhat tentatively. I will argue in Subsection E, infra, that the opinion accepts Thiboutot as binding precedent, although five Justices may wish to cut back its reach.

B. Requiring an Independently Implied Right.

There remains the question of what further "gloss" the Court will put on Thiboutot if Congress does not act. One approach the Court might take is to find § 1983 applicable only when a cause of action can be independently implied from the underlying statute which the plaintiff claims the defendant has violated. This approach would leave the result in Thiboutot intact, since the earlier welfare cases stemming from King v. Smith could be reinterpreted as brought under causes of action implied from the Social Security Act. Indeed, Justice Powell's dissent suggested such an analysis.

There is, however, a fundamental problem with this easy way out. Thiboutot decided not only the scope of § 1983 but also the propriety of awarding attorney's fees under § 1988. That statute refers, in part, to "any action or proceeding to enforce a provision of section[s]... 1983..." Section 1983 provides only a cause of action; it is not the source of any substantive right or duties. If the underlying statute already contains a cause of action -- express or implied -- the plaintiff does not need § 1983 in order to sue. If the plaintiff already has a "right" to sue the defendant, "secured" by the underlying statute, how can a suit under that statute be labeled an "action... to enforce... § 1983"? A possible answer is that § 1983 provides additional remedies, e.g., damages, not otherwise available as part of the implied cause of action, or that it facilitates access to state courts. Even so, to take this approach would seem close to total repudiation of much of the Thiboutot opinion.

C. Focusing on the Existence of Rights.

Alternatively, the Court might preserve Thiboutot, but direct a strict application in order to avoid the floodgates result which Justice Powell feared. This approach would emphasize the words "rights . . . secured by" in § 1983, and would require the plaintiff to show that he or she was clearly within the class to be benefited by the underlying statute, and that the benefit could be characterized as a "right." The question would be somewhat similar to the first of the four factors set out in Cort v. Ash, 422 U.S. 66 (1975), for determination of an implied cause of action; "First is the plaintiff one of the class for whose especial benefit the statute was enacted --- that is does the statute create a federal right in favor of the plaintiff?" The net result would be an inquiry somewhat similar to that which many lower courts have followed in determining whether to imply a cause of action.

Determining precisely when federal grant statues create rights may not be an easy task. The difficulty stems from the nature of the grant device itself. Funds go to a governmental body (which is thus aided), but the ultimate beneficiaries are individuals. The question for the courts will be at what point these benefits become rights. Answers may not be too difficult in the case of categorical grants and cross-cutting strings such as Title VI of the Civil Rights Act of 1964. However, as one moves into block grants -- apparently the wave of the future -- the picture is less clear. A good example is the Community Development Block Grant's statutory preference for activities benefitting low and moderate income people. Is a preference a right? At least two district courts appear to have concluded that it is not.

D. Delineating Kinds of Rights.

A recent opinion of the Eighth Circuit Court of Appeals suggests yet another appraoch: post - Thiboutot § 1983 actions will be limited to claims involving certain kinds of rights. The court noted that the Thiboutot plaintiffs sought statutorily conferred benefits essential to their food and shelter, and characterized these as "important personal rights akin to fundamental rights protected by the Fourteenth Amendment," First National Bank of Omaha v. Marquette National Bank of Minneapolis, 49 U.S.L.W. 2371 (8th Cir. Nov. 25, 1980.) One can appreciate the Eighth Circuit's attempt to find a middle ground between Justice Brennan's all-inclusive construction of § 1983 and a narrow, historically based reading. Conferring welfare benefits can be analyzed as a step toward achieving equality. The mechanism differs from an anti-discrimination statute, but the goals are parallel: all persons should have, at the very least, an adequate standard of living, as well as the opportunity to improve that standard free from barriers based on class. Moreover, welfare plaintiffs may not fare well at the hands of state and local officials. Thus they are strong candidates for the judicial protection of federal rights which § 1983 affords.

However, it should be noted that the Thiboutot majority refused specifically to limit § 1983 "to some subset of laws." Indeed, the Eighth Circuit's formulation seems close to the "personal rights" limitation upon § 1983's jurisdictional counterpart, an approach which the Supreme Court rejected emphatically in Lynch v. Household Finance Corp., 405 U.S. 538 (1972). Finally, an "important personal rights" test would not be easy to apply in the grant context, given the myriad of grant conditions. Provisions against any form of discrimination probably fit, but what about citizen participation requirements, or the Community Development Block Grant's preference for low and moderate income persons? It was similar difficulties of application that led to the rejection of the "personal rights" test in Lynch.

E. The Enigma of Pennhurst.

Any discussion of the post Thiboutot law of federal grants would be incomplete without reference to the somewhat perplexing decision in Pennhurst State School and Hospital v. Halderman, 49 U.S.L.W. 4363 (U.S. April 20, 1981). That case involved a challenge to conditions at a Pennsylvania facility for the mentally retarded, conditions which were, admittedly, inadequate. The decision on the merits is relatively clear cut. A 6 to 3 majority ruled that the "bill of rights" section of the Developmentally Disabled Assistance and Bill of Rights Act did not create substantive rights on the part of inmates of the facility, even though the state received funds under the Act. The Court distinguished the bill of rights section -- which it termed "precatory" -- from the specific conditions which Pennsylvania agreed to observe in order to receive the federal monies.

The case also deals with the plaintiffs' right to sue to enforce those conditions. This part of the decision is, to put it mildly, ambiguous. Three Justices stated that Thiboutot was controlling, and that it conferred such a right. Justice Blackman appeared to agree, although he stated that for the majority to even discuss the issue -- which was not before the Court -- amounted to rendering an advisory opinion. I agree, but will, nonetheless, attempt to decipher what the majority said.

Justice Rehnquist appeared to accept Thiboutot as binding precedent. Nonetheless, he suggested three ways in which the scope of that decision might be cut back. The first was to question whether the requirement of assurances that the grantee would obey the condtions "secured" any rights of the plaintiffs. This is similar to the analysis put forth in Subsection C, supra.

Second, he suggested that § 1983 would not be available if the statute contained an exclusive cause of action. However, the only reference to suits in the statute concerns challenges by grantees (states) to grantor decisions. Suits by third parties are not mentioned -- precisely the same situation as in Thiboutot.

Finally, Justice Rehnquist turned to the remedial aspects of § 1983 third party grant suits. He stated that "Respondents' relief may well be limited to enjoining the Federal Government from providing funds to the Commonwealth." However, the § 1983 action is not brought against federal officials, although they may be joined as defendants under an independent basis. Perhaps Justice Rehnquist meant that plaintiffs' only remedy is a decree requiring the grantee to conform or give up the funds. This would seem to preclude damages.

I submit that noone knows what this portion of the opinion means. Even the majority characterized the questions as "difficult," and remanded the whole matter to the Court of Appeals. I submit, further, that this confusion reflects, in part, the doctrinal defects of Thiboutot itself, and is one more illustration of the need to overturn that case.

IV. Thiboutot's Impact On Grant Litigation: Floodgates or Ratification?

A. Volume.

The previous section dealt with some of the difficult analytical and doctrinal questions raised by the Thibotout decision. This section will attempt to assess its practical impact. The first question to ask is whether Thiboutot will, in fact, cause any increase in grant litigation at all. Examination of the cases leads to the conclusion that the lower federal courts were frequently reaching results favorable to plaintiffs either through liberal application of the implied cause of action analysis, or through permitting statutory claims to be appended to constitutional claims. In particular, the grant area has been fertile ground indeed for application of the so-called "four factor test" set out in Cort v. Ash. It should be noted, however, that at least in the regulatory area, the Supreme Court has cut back substantially on liberal applications of the Cort test, almost to the point of renouncing it, The lower courts, so far, seem generally unaware of this development.

B. Attorney's Fees.

A second impact of Thiboutot is that by bringing § 1983 into the grant litigation picture, the attorney's fees provision of § 1988 is triggered. The availability of attorney's fees in grant litigation may well be the most significant result of Thiboutot. This development comes just as what might be called "attorney's fees law" is burgeoning as a whole new field, with developments largely favoring plaintiffs and their attorneys. A recent report by the Lawyer's Committee for Civil Rights Under Law concluded that "disputes over the amount of a fee are becoming increasingly complex, defense arguments more novel and innovative, and the fee computation portion of a case extremely time consuming. The end result, has, however, despite these difficulties been useful: the courts, whether willingly or not, are beginning to view public interest litigation as worthy and important litigation, and the fees awarded attorneys who undertake such cases are becoming larger." This development may, of course, lead to the bringing of more grant suits, since independently financed advocacy groups will have literally, nothing to lose. In addition, from the grantee point of view, the size of the fees themselves may become a problem. Grant litigation is frequently complex and time consuming; multi-staged proceedings including appeals, remands, rehearings, etc. are frequent. Though probably not "ruinous", these outlays could constitute a serious drain on some municipal treasuries. This Subcommittee may wish to examine the broader issues of attorney's fees in general, as well as in the Thiboutot context.

C. Damages.

A third possible impact of Thiboutot could be greater availability of damages for violation of federal grant statutes. The vast majority of third party grant suits appear to involve claims for declaratory and/or injunctive relief. The issue of damages is novel and relatively unexplored. Under traditional implication doctrine a court might be willing to imply a cause of action, but also find that a damage remedy was inappropriate. Since Thiboutot tells us that § 1983 means what it says, and since the statute provides in part, that any defendant subject to it "shall be liable to the party injured" courts might feel that they have no choice when damages are an appropriate remedy. The interaction between Thiboutot and Owen v. City of Independence, 100 S.Ct. 1398 (1980), becomes important at this point. Owen appears to establish strict municipal liability for violation of federal statutes as well as the Constitution. Justice Powell relied heavily on this point in his dissent in Thiboutot.

It remains to be seen, however, whether violations of grant conditions will present situations in which the courts regard compensation as an appropriate remedy. The defendant's conduct, and its consequences for the plaintiff, would probably have to be analagous to traditional common law torts, or to the kinds of violations of constitutional rights for which damages have been awarded since Monroe v. Pape, 365 U.S. 167 (1961). Justice Powell identified "unemployement, medicaid, school lunch subsidies, food stamps and other welfare benefits" as "particularly inviting subjects of litigation..." Since denial of a benefit essential to health or even to life itself could lead to serious and demonstrable harm, his prediction may prove correct. In a somewhat similar vein, Professor Richard Cappalli has explored the possibility of "senior citizen torts," "children's dietary torts," and "poor people's torts."

Whatever the meaning and impact of Thiboutot, it is clear that the decision is one more in a string of victories for plaintiffs, the net result of which is to increase substantially the ability to bring and the volume of third party grant litigation. For example, standing has virtually disappeared as an obstacle; and the jurisdictional amount has been abolished altogether in federal question cases. These developments have occurred at the same time that an increasing drum beat of criticism is being leveled at the grant system itself. The system is attacked as ineffictive, costly, and violative of principles of accountability. Some of the critics have noted the role which litigation plays in contributing to these conditions and to the overall complexity of federal grant programs. We turn now from Thiboutot to a general consideration of the impact of third party litigation on the functioning of the grant system.

IV. Third Party Litigation -- Good or Bad?

A. The Case For

The arguments in favor of suits by third parties attacking the award or administration of federal grants are straightforward and self-evident. Justice Harlan's opinion in Rosado v. Wyman, 397 U.S. 397 (1970), suggests two purposes which such suits further: making certain that Congress' will is not ignored by grantees, and protecting the individual beneficiaries of federal aid programs. These justififications overlap, but can be examined separately.

Congress attaches conditions to federal aid in order to achieve what it perceives as national objectives. This is true both as to program specific conditions, which prescribe how the money is to be spent, and "cross-cutting" conditions, which further values such as non-discrimination or environmental protection. The very presence of any string represents a potential displacement of the grantee's freedom to choose, in that the grantee might well not have chosen to follow the course of conduct "mandated" by the string. That is why Congress imposed the condition in the first place. There is thus an inherent potential for grantee evasion and disobedience of virtually all grant conditions. Among the examples of motivation might be a desire to cut costs, legitimate disagreement over how best to operate a program, or an outright desire to convert federal dollars to uses other than those intended by Congress. Allowing third parties to sue to enforce grant conditions is an essential tool to help keep the grantees honest. In this context it is important to note that grantor agencies may be less than zealous in their own enforcement of conditions.

It is also important to focus on the types of person likely to bring such suits. In many instances, they will be individuals or groups with little clout in the grantee's political processes. Examples include welfare recipients such as the Thiboutot plaintiffs, racial minorities, classes such as the handicapped, low income persons generally, or those promoting a locally unpopular cause such as environmental protection. (The typical case would be one in which the overwhelming majority of a community wants to build a federally aided facility, but a small group of environmentalists seeks to block it.) A fundamental premise which underlies much of the present grant system is that state and local governments cannot be counted on to respond adequately to such interests. Thus, third party grant suits represent one more instance of the federal courts serving as "the primary and powerful mechanisms for vindicating every right given by the Constitution, the laws, and treaties of the United States."

B. The Counter-Arguments.

1. The Traditional Objections.

Grant litigation has not lacked critics. Dissenting in Rosado, Justice Black expressed a strong preference for the administrative process as the initial point for resolution of third party grievances against grantees. He noted that Congress had established detailed provisions for review by H.E.W. of state compliance, and expressed concern that "it will be impossible for H.E.W. to fulfill its function under the Social Security Act if its proceedings can be disrupted and its authority undercut by courts which rush to make preceisely the same determination which the agency is directed by the act to make."

Thus, Juctice Black saw third party grant disputes as strong cases for invoking the doctrine of primary jurisdiction. A somewhat analogous objection to grant litigation is that the issues involved may be too complex for the courts to handle. One district judge began an opinion in a Social Security Act case with the following observation: "This is a case that does not belong in this court. It involves three governmental agencies -- federal, state and city -- and centers on regulations so drawn that they have created a Serbonian bog from which the agencies seemingly are unable to extricate themselves."

A third objection to grant litigation might be based on federalism prinicples drawn from cases such as Rizzo v. Goode, 423 U.S. 362 (1976). It may be undesirable for the federal courts to thrust themselves deeply into the everyday spending decision of states and localities. The Second Circuit once indicated that it did not want to function as the welfare commissioner for the State of Connecticut.

Whatever force these objections may have, the Supreme Court has, explicitly and implicitly, rejected them in a virtually unbroken line of precedent stretching from King v.Smith, 392 U.S. 309 (1968), to Thiboutot. However, one can outline a new and somewhat different set of objections to third party grant litigation. They are liable to be presented with considerable force as a full scale debate on the future of the grant system moves to center stage. These objections are rooted in, and are part of, a fundamental disenchantment with the system in its present form.

2. The Grant System - Out of Control?

There is a growing consensus among many specialists in the field of intergovernmental relations that the grant system has grown so complex as to be unworkable. The principal source of these criticisms is the prestigous Advisory Commission on Intergovernmental Relations (ACIR). A 1978 Commission report on the intergovernmental aid system concluded that: "never has the maze of fiscal, functional, regulatory and administrative links between and among the federal government, the states, and all substate units been more complex, costly and convoluted than it is now." A 1980 ACIR Report on "The Federal Role in the Federal System", (Subtitled "A Crisis of Confidence and Competence") spells out the problems in detail. Grant programs are exceedingly difficult to implement because of "administrative failures, red tape, and tensions between the levels of government. . . ." There is mounting evidence that grants do not achieve their programatic goals. "In field after field the results of some federal-state-local assistance and regulatory programs have fallen well short of initial expectations." Additionally, participation in federal grant programs can be very costly to recipients. Administrative costs can be high due to the "proliferation of programs serving similar objectives and the extraordinary specifity of numerous program efforts, all in the same functional area and each with its own administrative requirements and procedures. . . . "

Finally, there is the issue of accountability.

> "The root problem is that, in intergovernmental programs, no level bears full administrative responsibility for the use of public funds. Fiscal accountability is divided and confused. As a consequence it is widely believed that local officials "gold plate" their federal grant applications and are willing to incur costs that would be unacceptable if they were wholly financed from local tax revenues. Similarly, federal officials can not really be held responsible for the uses made of funds by lower levels of government, as they can in the federal government's own direct activities."

The ACIR's gloomy assessment is shared, in varying degrees, by many others, including the Office of Management and Budget, the grantee community, and members of Congress. The problems outlined by the ACIR are serious enough as it is. They could lead to worse consequences. One, albeit unlikely, might be a complete dismantling of the grant system, given President Reagan's campaign pledge to "transfer, whenever possible, federal programs back to state and local governments along with the tax sources to pay for them. . . ." If this transfer takes the form of block grants, as seems more likely, the loss to current program beneficiaries may not be great. But if the federal government simply gives up programs, there is no guarantee that states and localities will assume them. In some cases constitutional and statutory limits on taxing and spending may prohibit it. On the other hand, if the system simply remains as it is, potential grantees may forego federal funding. There is, in fact, a growing tendency to stay away from federal funds because of the very kinds of problems the ACIR mentioned. If the critics' view of the system is accurate, sweeping reforms will be necessary. For purposes of this testimony, however, it is enough to examine the extent to which, if any, grant litigation has helped create the present situation.

3. The Courts as Part of the Problem.

Some analysts have suggested that the rising tide of grant litigation is one of the causes of the current problems of the grant system. There are several ways in which third party suits might lead to the type of difficulties cited by the ACIR.

The most obvious is the costs of grant suits. There are the costs of defending the suit. Many such cases are, in effect, brought by independently financed advocacy groups who do not shy away from the prospect of litigating at the appellate level, and ideally, in the Supreme Court. Thus the litigation, apart from its inherent complexity, is likely to be protracted. Many third party grant suits are brought to stop a federally funded project. Even if the defendant ultimately prevails on the merits, the project may have been substantially delayed. This can increase project costs dramatically. In many instances plaintiffs do win, or a settlement is reached. This can bring into play attorney's fees -- since, under Thiboutot, grant suits are now § 1983 suits -- and, of course, the costs of compliance. These costs will vary widely, depending on the type of suit, but can be substantial.

Another aspect of the cost issue is the availability of damages from the grantee and its officials -- an open issue after Thiboutot, as discussed in Section IV, infra. The issue of damages in grant litigation is beginning to receive scrutiny. The Harvard Law Review has argued strongly for damages in post-Thiboutot § 1983 cases. "Only then will effective compensation and deterrence take place." Professor Richard Cappalli, in a provocative article, offers a diametrically opposed analysis. He argues that compensating those hurt by incorrectly administered grant statutes will divert scarce resources away from programatic ends. He also views such awards as increasing the chances governments will opt out of grant programs.

Third party litigation also contributes to the complexity and difficulty of administering grant programs. Issues in the suit itself will frequently be baffling to officials not trained in the law. More serious are the effects of the pendency of the suit on the grantee's decision making processes. Take the case of a nearly bankrupt city which decides to close a federally aided facility as part of an overall austerity drive. Minority plaintiffs sue to enjoin the shutdown on the ground that it will discriminate against them in violation of Title VI of the Civil Rights Act of 1964. If the district court grants temporary relief does the city then make other cuts, or hold its breath and hope to prevail on appeal, assuming the appellate court acts expeditiously? Suppose the district court denies relief, but the plaintiffs appeal. Again, what happens to the municipal budgetary process? One answer might be to rely on the advice of the relevant grantor agency. But the federal courts may not agree with the agency. In the widely discussed Hartford community development litigation the grantee defendants were in compliance with H.U.D. guidelines. Nonetheless, the district court and court of appeals overruled H.U.D. Despite the possibility of such a result, grantees are likely to insist on elaborate guidance and written assurances of compliance before doing anything. To the extent that they have flexibility, they are likely to be exceedingly timid in exercising it.

Third party suits also aggravate the accountability component of grant programs. Contemporary intergovernmental relations are already loaded with opportunities for finger pointing and buck passing. Litigation complicates the question of who's in charge here. Is it the feds, the grantee, or the judge?

Grant suits can also frustrate the achievement of program goals. Take the case of an economic development project involving federal, local, and private funds, which is attacked on the grounds of inadequate citizen participation. If the court agrees with plaintiffs and grants an injunction, the resultant delay will drive up costs. The public funds may no longer be sufficient. The developer may pull out. Which would Cong ess have preferred: the project without the participation, or the participation without the project? The court is not in any position to make such tradeoffs. It must enforce the grant conditions as they are written.

In sum, third party grant suits may well be a major component of what is wrong with the grant system. It is naive for their proponents to trumpet "the promise of Thiboutot" without recognizing the negative consequences. It would be equally naive for grantees, and their allies, to assert that all of their grant related activities should be shielded from judicial review in the interest of a "smoother" system.

VI. The Congressional Response - Beginning the Dialgue.

A. Overturning Thiboutot, S. 584.

The role of the courts in the grant system is certain to come under close scrutiny in the Ninety-Seventh Congress. One of the first issues, of course, will be whether to enact S. 584, the bill before you today. S. 584 would limit § 1983's coverage of statutory claims to laws which protect equal rights. Given the symbolic - as well as very real - importance of § 1983, one should approach with caution any proposal which might be viewed as an attempt to "cut back" on the protection of civil rights. Nonetheless, as the analysis presented in the first half of this testimony suggests, there are a number of excellent reasons to enact the bill.

Congress may simply view the holding that all grant suits are § 1983 suits as wrong. Alternatively, it may be apprehensive about Thiboutot's possible impacts on the grant system, and conclude that one need not wait for them to materialize before acting. Overturning the decision does not present any far reaching constitutional issues of Congress' power over the jurisdiction of the federal courts. Thiboutot involved interpretation of a federal statute, in particular, its relationship to other federal statutes. Indeed, Justice Brennan suggested that those unhappy with the decision address their arguments to Congress.

Nonetheless, any attempt to limit § 1983 to a "particular subset of laws" poses the problem of defining that subset. As introduced, S. 584 uses the term "any law providing for equal rights of citizens or of all persons within the jurisdiction of the United States." One might question why the term "civil rights" was not used instead, especially since § 1983 is generally referred to as a civil rights law, and since it derives from the Civil Rights Act of 1871.

The answer is to be found in the plurality opinion by Justice Stevens in Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979). He noted that § 1343(3) of Title 28, which is traditionally described as the "jurisdictional counterpart" of § 1983, refers, in part, to "any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." In rejecting the contention that this statute provided for jurisdiction over a claim under the Social Security Act, he stated that "[T]he Congress that enacted § 1343(3) was primarily concerned with providing jurisdiction for cases dealing with racial equality..." He recognized, however, that the "common understanding" of a concept such as equality could change over time.

Thus, under S. 584, § 1983 tracks its jurisdictional counterpart, as interpreted in Chapman. This was the position which Justice Powell advocated in his Thiboutot dissent. The question arises whether courts will have difficulty in differentiating those statutes which provide for equal rights from those which do not. Statutes which prohibit discrimination against a particular class are a clear example of those that do. § 504 of the Rehabilitation Act is a good example. Statutes creating a preference, such as the minority business set-aside program upheld in Fullilove v. Klutznik, 100 S.Ct. 2578 (1980), present a harder case. As discussed in Section III, infra, the question is whether the benefits they provide can be classified as rights. Citizen participation provisions, on the other hand, probably do not fall within the equal rights category, although they might fit Justice Stevens' definition of "civil rights." In resolving these issues, should the bill pass, it will be essential to develop explicit legislative history as a guide.

B. Beyond S. 584.

Passage of S. 584 may be an important first step, but it is only that. The entire pheomenon of grant litigation -- both grantor-grantee disputes as well as third party suits -- needs a thorough overview by the Congress. I realize that these issues are not before us today, and are largely not within the ambit of either this Subcommittee nor its parent Committee. Thus, I will offer only some brief observations.

The primary responsibility in this area rests with Congress. It would be virtually impossible to address the issue of the role of the courts in any across-the-board legislation. The grant programs are simply too varied, and the disputes they generate too dissimilar. Block grants present different issues than categorical programs. It makes a difference whether one is talking about suits to enforce the "cross cutting" conditions, or program specific strings. Many different, and difficult value judgments have to be made. Allegations of racial discrimination in a grant program are more serious candidates for federal judicial review than claims by disapoointed vendors that the grantee has violated contractual obligations, while claims of insufficient citizen participation lie somehwere in between. At the moment it is the courts which make these judgments, on an ad hoc, and highly unpredictible basis.

The role of the courts ought to be addressed specifically each time the administration and the Congress deal with restructuring or reauthorizing each grant program. The design of grant consolidation packages, which the Reagan Administration has advocated would provide an ideal opportunity. It should be possible to identify in advance the types of third-party disputes which a given program would generate. Policy makers could then decide which should be insulated from judicial review, which should receive limited judicial review, and which should receive wholescale review of the sort awarded in most third party suits as things stand now. For example, the issue of whether there had been adequate citizen participation might be considered committed to agency discretion, while complaints of racial or sexual discrimination would still be able to be heard in a judicial forum, perhaps after exhaustion of administrative remedies. Attorney's fees could be provided for in appropriate cases.

The alternative to specific legislature consideration means leaving matters up to the courts. The thrust of this testimony is that that approach has not worked in the past, and there is little reason to think it will in the future. Of course, if the new grant programs which emerge contain a radical reduction in the number of grant conditions, it seems likely that there would be a concommitant decrease in the number of third party suits. However, the issue of the cross-cutting requirements, which generate many of the third party suits, would still remain. The thesis advanced here is that careful consideration by the Administration and the Congress of the issue is the only way to achieve a solution which takes into account both the programatic and federalism values to be served by any federal grant statute, as well as the rights and interests of the individuals affected by such programs. The task is not easy; the trade-offs are difficult. Nonetheless, these issues have been simmering just beneath the surface for some time now. An honest dialogue will be necessary to arrive at an adequate resolution. At the very least, it is time for the dialogue to begin.

Senator HATCH. I regret that Professor Brown was not here to give us the benefit of his expertise in person, but we, of course, wish him a quick recovery.

I am delighted to have my counterpart here to take this testimony, the ranking minority member on this subcommittee, Senator DeConcini. I hope you will forgive me because I have to go to the floor and finish the Pauken nomination.

Thank you, Senator DeConcini.

Senator DECONCINI [acting chairman]. Mr. Madden, please come forward. Your prepared statement will be made part of the hearing record in its entirety following your oral presentation. Please proceed.

STATEMENT OF THOMAS J. MADDEN, ESQ., LAW FIRM OF KAYE, SCHOLAR, FIERMAN, HAYS & HANDLER

Mr. MADDEN. Senator, I want to thank you today for this opportunity to appear before your committee. I have practiced law in the intergovernmental area for a number of years and I feel your subcommittee is focusing on perhaps the most important intergovernmental law issue that faces us today.

A few weeks ago the American Society for Public Administration published in *Public Administration Review* a paper I wrote with Walter Groszyk, an official with the U.S. Office of Management and Budget. The paper dealt with the subject of today's hearings and was entitled "Managing without Immunity: the Challenge for

State and Local Government Officials in the 1980's." A copy of that is attached to my testimony. Many of my comments will draw on that paper.

Before proceeding, I want to state my opinion, as well as that of countless others, that 42 U.S.C. 1983 provides important protections for the citizens of this country. I believe that the chairman of this subcommittee made this same point in introducing S. 584 and S. 585, and he made the same point again this morning.

I feel that Congress, however, must give consideration to the very serious impact that section 1983, as recently interpreted by the courts, can have on the operations of a State and local government when an official of that government misinterprets or misapplies the myriad of Federal laws, regulations, and rules governing the expenditure of Federal funds or governing State and local activities in areas where there is a constitutional or statutory Federal interest. This is an appropriate subject for hearings and legislative initiatives.

I would like to turn now to the central point of my testimony.

The Supreme Court's 1980 rulings in *Owen* v. *City of Independence, Maine* v. *Thiboutot,* and *Maher* v. *Gagne,* when read together with other recent decisions, enunciate a set of standards under which:

First, local government may be held strictly liable for constitutional violations even though the violations resulted from actions taken in good faith by government officials.

.Second, State and local government officials may be held liable whenever a person has been injured through the administration of any Federal-State or Federal-local cooperative program, regardless of whether that program is related to civil rights. These cooperative programs can cover both Federal grant programs and Federal regulatory efforts.

Third, aggrieved persons may pursue claims alleging injury not only in Federal courts, but also in State courts.

Fourth, successful plaintiffs in such cases may recover their attorney's fees from defendant officials or from their governments.

The effect of these decisions clearly is to seriously erode the once sturdy bulwark of governmental immunity and expose State and local government officials to a liability they had once thought remote or unlikely. The rulings are likely to dampen State and local government enthusiasm for taking innovative and adaptive approaches toward program management.

The Federal Government should focus, I believe, on identifying available and practicable means for dealing with the cumulative effect of these decisions on the management of Federal assistance programs.

The effects can only be anticipated at this juncture; the court decisions are too recent and the true consequences are yet to be realized. However, certain results are likely.

First, much more administrative inefficiency may be introduced into the operation of assistance programs. When confronted with the prospect of culpability, managers can introduce protective measures to diminish their liability. These measures, in the form of elaborate procedures, extensive review and coordination, or manifold levels of decision and approval—all of which may sound managerially proper—could induce administrative inertia, delay, and wasted resources. Government bureaucracy may turn apprehensive and become less effective, less timely, and more concerned with the impact of any action upon itself than on the recipients of the assistance it provides.

Engendering a second effect is the degree of delegation which occurs in most government bureaucracies. The government official made a party to most section 1983 actions is often the highest elected or appointed official having responsibility over the function whose actions precipitated the alleged injury. In very large bureaucracies, such as those servicing social assistance programs, the actions of subordinate officials might be beyond the direct cognizance of the person in charge. But this may not alleviate the superior's culpability.

The third significant effect is induced more by the party not present as a defendant in most of these section 1983 actions—the Federal Government. Presently, the Federal Government retains much more sovereign immunity than State or local governments. This disparity in burden-sharing and liability between the Federal Government on one hand and State and local governments on the other can foment ill-will, insensitivity, and a general and understandable reluctance by State and local government officials to assume responsibilities for cooperative programs when the legal exposure is targeted on them.

A fourth consequence is a developing weariness of government officials who discover more and more of their time and energy being sapped in responding to legal claims and defending their actions, rather than in directing and overseeing tasks and subordinates.

There is another major Federal Government concern, and that is a perception—formed not by the legal consequences of these decisions, but from an appreciation of existing attitudes and tendencies on the part of State and local government—that State and local officials may now choose not to administer Federal assistance programs beyond what they are absolutely compelled to do.

Turning now to the legislation pending before the committee, I believe in the good faith defense provided in S. 585, and I strongly support the concept embodied in S. 585. With section 1983, the courts, on behalf of citizens, have been drawn into areas that had traditionally been reserved for the executive branch. And there is no ready remedy for the circumstance in which the executive now finds itself. Indeed, the search for an easy solution is complicated by the nature of the recent decisions. Not only can citizens sue if they believe their constitutional rights are infringed, but they now may pursue legal remedies if their statutory rights are restricted as well.

Anticipating such legal recourse and introducing corrective measures is not a simple matter for the government official because constitutional rights, particularly those derived from the 14th amendment, are periodically defined and expanded by the courts, and new statutory rights are becoming discovered with great frequency and existing statutory rights are being redefined.

Within the last 2 weeks, for example, the Supreme Court in *Pennhurst State School and Hospital, et al.* v. *Halderman, et al.,* redefined the way in which the court will look at rights created under Federal grant programs and, while that decision promises some relief to the State of Pennsylvania from the costs of accepting the grant funds at issue in that case, the ultimate effect is to add a great deal of uncertainty as to the obligations of State and local officials under grant programs and therefore under section 1983. Under such conditions of uncertainty, it is difficult designing any system of management which can assure officials that reasonable actions and efforts on their part will secure all the rights provided citizens and immunize the official from liability.

It is for all of these reasons that a good faith defense for municipalities is important.

S. 584 would propose to amend the basic text of section 1983 to limit the term "laws" to "any law providing for equal rights of citizens and of all persons within the jurisdiction of the United States." I am concerned about the potential impact of this amendment.

On the one hand, a broad reading of many of the Supreme Court decisions, such as *Thiboutot* and *Chapman* v. *Houston Welfare Rights Organization,* would define the underlying legislation at issue in these cases—the aid to families with dependent children legislation—as being a law which provides for equal rights of citizens. On the other hand, however, this provision could be interpreted to include only those laws such as title VI of the Civil Rights Act of 1964 or section 504 of the Rehabilitation Act, which specifically reference equal protections and guarantees.

I feel the matter deserves close scrutiny, more scrutiny than I can give in the brief period of my testimony. A close analysis of the impact of this amendment I believe is important to assure that it does not take away some important rights now given to the citizens of this country. I feel the concept of defining more clearly the intention of section 1983 that is at the heart of S. 584 is very important. Indeed, as we note in our article, the Supreme Court in *Thiboutot* seemed to invite the Congress to step in and take action—an action that must thread its way through the twin problems of crafting a substantial legislative solution which helps State and local governments and which protects the rights, privileges, and immunities now secured for the citizens of this country by the Constitution and laws of the United States.

It is important that this subcommittee look at this issue and try to reach the proper solution. Without a legislative amendment to section 1983, there are few solutions which can relieve State and local governments of the potentially devastating burden that arises out of the *Thiboutot* and similar decisions under section 1983.

Solutions such as education, model legislation and procedures, and delegation now offer only limited help to State and local officials.

These efforts can concentrate on making sure that State and local officials are aware of what is expected, and what must and can be done to protect the rights of citizens. Such an awareness and the introduction of reasonable measures to accommodate these rights offer some limited measure of immunity as a result of good faith action, particularly when coupled with the protections of S. 585.

A more radical approach would be to develop a program of Federal indemnification under which all liability above some maximum level would be assumed by the Federal Government in section 1983 actions where liability arises out of a joint Federal and State or local government effort.

Unlike William Ernest Henley's unsung hero in "Invictus," State and local officials are not masters of their fate. They do not know what clutch of circumstances will bring them before the courts in a section 1983 lawsuit as the Supreme Court wrestles over the meaning and application of the rights, privileges, and immunities secured by the Constitution and other laws of the United States. If past history is any guide, there will evolve newly defined rights for individuals with a commensurate loss of traditional prerogatives and immunities for State and local government.

Therefore, I think it is very important that this committee focus, as it is focusing in S. 584, on the application and the meaning of section 1983, and limit that application and meaning to those essential rights and privileges that need to be secured for the citizens of this country.

Thank you.

Senator DECONCINI. Thank you very much, Mr. Madden.

The good faith restoration clause here is of a little bit of concern to me. We have a community in Arizona that is faced with potential litigation and liability. I am interested in your observation in your statement. I always get torn, as perhaps you do, when you try to exempt someone from some liability. You obviously feel that this clause would not really make public officials immune, that a potential person who felt the violation would not have too great a burden of proof in attempting to bring an action.

I wonder if you would comment on any past experience of the use of such defenses in any other areas. I cannot think of any, but I thought perhaps you might have some evidence we could show for the record that this has not been too onerous on a potential violator or a person who is alleging a violation.

Mr. MADDEN. I have a little difficulty in doing that because we are dealing with something created by the Supreme Court in this *City of Independence* case. If you get into the case and look at the circumstances of the case, it really raises some very significant problems.

You have a situation there where the Supreme Court said that the officials but not the city had a good faith immunity. In this case the issue arose arose out of the firing of a police chief. The officials responsible for the firing first consulted with the city attorney. The city attorney looked at the laws that existed at that point and said that the police chief was hired on a discretionary basis and that the city charter allowed termination of his employment without giving him a hearing and without explaining to him the reasons for his firing.

Then the Supreme Court, a few months later decides that the 14th amendment has always encompassed a liberty right for Government employees and where the reputation of a Government employee is at issue due process requires that these employees be given a hearing before they are terminated.

Then the Supreme Court some years later, while the *Owen* case was still working through its appeals process, said that, "We were wrong when we said that municipal corporations were not persons within the meaning of section 1983; they really are persons."

Therefore, we arrived in 1980 with the city of Independence being held strictly liable for a failure to give this police chief a hearing. I am concerned about this type of result.

By allowing a good faith defense for the city, we are putting the city on an equal standard with the officials of that city, with Federal Government officials and with State officials. We are at the same time saying that there may be egregious circumstances where a person including a city, acted in bad faith, did not act in good faith. The person knew what the law was and ignored the law. In those circumstances a lawsuit could be brought.

Senator DECONCINI. The argument has been made against the good faith defense that the municipalities, and thus the public, should bear the burden of their violation rather than the individual. Do you feel that the policy considerations you have mentioned are weighty enough to justify that Government harm to an individual be borne by that person in the limited situation where a good faith defense would apply?

Mr. MADDEN. I think that the policy considerations are weighty enough because we are now talking about a very limited situation, good faith. We are talking about people who have to make day-to-day decisions on how to administer government. Those people make their judgments. They seek proper legal advice. They act in good faith. I think it is not unreasonable to say that is an appropriate manner in which the Government should operate.

The costs of eliminating a good faith defense are borne by a large group of people. They are borne by all the taxpayers within a particular city. I do not think it is a question of getting into risk allocation. We are talking about a situation there where you allocate risk between different parties, between an individual and between a group. I do not think that is an inappropriate point for this legislation.

Senator DECONCINI. Fine. I have no further questions. Thank you very much, Mr. Madden. We are pleased to have you here.

Mr. MADDEN. Thank you, Senator.

[Material follows:]

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

STATE AND LOCAL LIABILITY UNDER 42 U.S.C. §1983

"MANAGING WITHOUT IMMUNITY: THE CHALLENGE FOR STATE AND LOCAL GOVERNMENT OFFICIALS IN THE 1980s"

Testimony of
Thomas J. Madden, Esquire
Kaye, Scholer, Fierman, Hays & Handler

Before the
Senate Judiciary Committee
Subcommittee on the Constitution

May 7, 1981

Mr. Chairman, Members of the Committee, I want to thank you for this opportunity to appear before your Committee today. I have practiced law in the intergovernmental area for many years and I feel your Subcommittee is focusing on perhaps the most important intergovernmental law issue that faces us today.

A few weeks ago, the American Society for Public Administration published in Public Administration Review (par) a paper I wrote with Walter Groszyk, an official with the United States Office of Management and Budget. The paper dealt with the subject of today's hearings and was entitled "Managing Without Immunity: The Challenge for State and Local Government Officials in the 1980s." (Copy attached.)

In the paper, we discussed the problems state and local officials will have in administering federal assistance and regulatory programs as a result of recent Supreme Court decisions interpreting 42 U.S.C. §1983. Under §1983, a person is liable to an injured party when (1) the person acts "under color of any law, statute, ordinance, regulation, custom or usage of any state" and (2) the person deprives any citizen or person in the United States of "any rights, privileges or immunities secured by the Constitution and laws." Much of the following comments draw on that paper.

Before proceeding, however, I want to clearly state that in my opinion and as well as that of countless others, 42 U.S.C. §1983 provides important protections for the citizens of this country. I believe that the Chairman of this Subcommittee made this same point in introducting S. 584 and S. 585. Section 1983 was added at a critical time in our nation's history and the protections which it provides continue to help assure Americans the full protection of our laws and the Constitution. I feel that §1983 is an important and critical law and is a testament to what this country stands for.

However, I also feel that the Congress must give consideration to the very serious impact that 42 U.S.C. §1983, as recently interpreted by the courts, can have on the operations of a state and local government when an official of that government misinterprets or misapplies the myriad of federal laws, regulations and rules governing the expenditure of federal funds or governing state and local activities in areas where there is a Constitutional or statutory federal interest. This is an appropriate subject for hearings and possible legislative initiatives to deal with this serious problem for state and local governments. The broadest range of views should be sought, and I am willing to work with this Subcommittee in an effort to address this problem in a manner consistent with effective enforcement of the civil rights laws and guarantees of the Constitution.

Now I would like to turn to the central points of my testimony.

The Supreme Court's 1980 rulings in Owen v. City of Independence, Maine v. Thiboutot, and Maher v. Gagne, which when read together with other recent decisions, enunciate a set of standards under which:

(1) local government may be held strictly liable for Constitutional violations even though the violations resulted from actions taken in good faith by government officials;

(2) state and local government officials may be held liable whenever a person has been injured through the administration of any federal-state or federal-local cooperative program, regardless of whether that program is related to civil rights; these cooperative programs can cover both federal grant programs and federal regulatory efforts;

(3) aggrieved persons may pursue claims alleging injury not only in federal courts, but also in state court; and

(4) successful plaintiffs in such cases may recover their attorney's fees from defendant officials or from their governments.

The effect of these decisions clearly is to seriously erode the once sturdy bulwark of governmental immunity and expose state and local government officials to a liability they had once thought remote or unlikely. The rulings are likely to dampen state and local government enthusiasm for taking innovative and adaptive approaches toward program management, for the prospect is the more they exercise ministerial flexibility, the greater the probability their administration of that program will be challenged.

One immediate concern of the federal government should focus on identifying available and practicable means for dealing with the cumulative effect of these decisions on the management of federal assistance programs. It also involves reassuring prospectively state and local government officials that initiative and flexibility will not be rewarded with litigation.

The effects on the government official can only be anticipated at this juncture; the court decisions are too recent and the true consequences are yet to be realized. However, certain results are likely to occur. First, much more administrative inefficiency may be introduced into the operation of assistance programs. When confronted with the prospect of culpability, managers can introduce protective measures to diminish their liability. These measures, in the form of elaborate procedures, extensive review and coordination, or manifold levels of decision and approval (all of which may sound managementally proper), could induce administrative inertia, delay, and wasted resources. Government bureaucracy may turn apprehensive and become less effective, less timely, and more concerned with the impact of any action upon itself than on the recipients of the assistance it provides.

Engendering a second effect is the degree of delegation which occurs in most government bureaucracies. The government official made a party to most §1983 actions is often the highest elected or appointed official having responsibility over the function whose actions precipitated the alleged injury. In very large bureaucracies, such as those servicing social assistance programs, the actions of subordinate officials might be beyond the direct cognizance of the person in charge. But this may not alleviate the superior's culpability.

The third significant effect is induced more by the party not present as a defendant in most of these §1983 actions--the federal government. Presently, the federal government retains much more sovereign immunity than state or local governments. This disparity in burden-sharing and liability between the federal government on one hand and state and local governments on the other, can foment ill-will, insensitivity, and a general and understandable reluctance by state and local government officials to assume responsibilities for cooperative programs when the legal exposure is targeted on them.

A fourth consequence is a developing weariness of government officials who discover more and more of their time and energy being sapped in responding to legal claims and defending their actions, rather than in directing and overseeing tasks and subordinates.

There is one other major federal government concern, and that is a perception--formed not by the legal consequences of these decisions, but from an appreciation of existing attitudes and tendencies on the part of state and local government--that state and local officials may now choose not to administer federal assistance programs beyond what they are absolutely compelled to do. Even before these decisions, there was occasional rebelling over federally-imposed procedures and requirements, and, infrequently, a state or local government would even decline federal assistance on the belief the burden was not commensurate with the benefit.

President Reagan's emphasis on turning programs back to state and local government may ultimately go unrealized in part because the devolution strategy centers on enhancing the management of federal programs by reducing the duplicate layers of federal and non-federal schemes for improved management. These schemes are to a large degree predicated on the willingness of state and local government to exercise a role in administering the use and disbursal of federal monies. The recent Supreme Court decisions on 42 U.S.C. §1983, however, now cast serious doubt on whether such objectives are reasonable or even achievable.

Turning now to the legislation pending before this Committee, I believe in the good faith defense provided by S. 585, and I support the concept embodied in S. 585. With §1983, the courts, on behalf of citizens, have been drawn into areas that had traditionally been reserved for the executive branch. And there is no ready remedy for the circumstance in which the executive now finds itself. Indeed, the search for an easy solution is complicated by the nature of the recent decisions. Not only can citizens sue if they believe their Constitutional rights are infringed, but they now may pursue legal remedies if their statutory rights are restricted as well.

Anticipating such legal recourse and introducing corrective measures is not a simple matter for the government official because Constitutional rights, particularly those derived from the Fourteenth Amendment, are periodically defined and expanded by the courts, and new statutory rights are becoming discovered with great frequency and existing statutory rights are being redefined. Within the last two weeks, for example, the Supreme Court in Pennhurst State School and Hospital et al. v. Halderman et al. redefined the way in which it will look at rights created under federal grant programs and while that decision promises some relief to the state of Pennsylvania from the costs of accepting the grant funds at issue in that case, the ultimate effect is to add a great deal of uncertainty as to the obligations of state and local officials under grant programs and therefore under 42 U.S.C. §1983. Under such conditions of uncertainty, it is difficult designing any system of management which can assure officials that reasonable actions and efforts on their part will secure all the rights provided citizens and immunize the official from liability.

It is for all of the above reasons that a good faith defense for municipalities is important.

S. 584 would propose to amend the basic text of 42 U.S.C. §1983 to limit the term "laws" to "any law providing for equal rights of citizens and of all persons within the jurisdiction of the United States." I am concerned about the potential impact of this amendment. On the one hand, a broad reading of many of the Supreme Court decisions such as Thiboutot and Chapman v. Houston Welfare Rights Organization, would define the underlying legislation at issue in these cases--the Aid to Families with Dependent Children legislation--as being a law which provides for equal rights of citizens. On the other hand, however, this provision could be interpreted to include only those laws as Title VI of the Civil Rights Act of 1964 or Section 504 of the Rehabilitation Act which specifically reference equal protections and guarantees.

I feel the matter deserves more close scrutiny than I can give in the brief period of my testimony. A close analysis of the impact of this amendment I believe is important to assure that it does not take away some important rights now given to the citizens of this country. I feel the concept of defining more clearly the intention of 42 U.S.C. §1983,is important. Indeed, as we note in our article, the Supreme Court in Thiboutot seemed to invite the Congress to step in and take action---an action that must thread its way through the twin problems of crafting a substantial legislative solution which helps state and local governments and which protects the rights, privileges and immunities now secured for the citizens of this county by the Constitution and laws of the United States.

It is important that this Subcommittee look at this issue and try to reach the proper solution. Without a legislative amendment to §1983, there are few solutions which can relieve state and local governments of the potentially devasting burden that arises out of the Thiboutot and similar decisions under §1983.

Solutions such as education, model legislation and procedures, and delegation now offer only limited help to state and local officials.

These efforts can concentrate on making sure that state and local officials are aware of what is expected, and what must and can be done to protect the rights of citizens. Such an awareness and the introduction of reasonable measures to accommodate these rights offer some limited measure of immunity as a result of good faith action, particularly coupled with the protections of S. 585.

A more radical approach would be to develop a program of federal indemnification under which all liability above some maximum level would be assumed by the federal government in §1983 actions where liability arises out of a joint federal and state or local government effort. An indemnification scheme covering §1983 judgments could also cap the maximum liability under individual programs or could cap the maximum cumulative liability a state or local governments would have to bear in any given year. It could assign priorities under the various classes of damages so that those which are the most severe and readily computable would receive first consideration.

Unlike William Ernest Henley's unsung hero in "Invictus," state and local officials are not masters of their fate. They do not know what clutch of circumstances will bring them before the courts in a 42 U.S.C. §1983 lawsuit as the Supreme Court wrestles over the meaning and application of the rights, privileges, and immunities secured by the Constitution and other laws of the United States. If past history is any guide, there will evolve newly defined rights for individuals with a commensurate loss of traditional prerogatives and immunities for state and local government.

MANAGING WITHOUT IMMUNITY: THE CHALLENGE FOR STATE AND LOCAL GOVERNMENT OFFICIALS IN THE 1980s

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Q. . . . [D]id you say . . . to the other members of the City Council, "This case is travesty."?
A. I may have.
Q. Did you also say, sir, to the other members of the City Council . . . "I don't have to go to church for ten weeks, because I've been in this courtroom for a week," did you say that, sir?
A. I may have.
. . .
Q. . . . [D]id you also say, sir, that the closest thing to God on earth is a Judge, did you say that, sir?
A. I think that's a matter of public fact, everyone knows that, you included.[1]

The beleagured City of Newport, Rhode Island councilman, responding to these questions put by the attorney for an organization whose entertainment permit had been cancelled by the city council, may have voiced the quiet mutterings of many state and local government officials apprehensive about recent Supreme Court decisions which have significantly expanded their personal liability as well as that of their governmental units. The consequences of these decisions can be both direct and costly.[2]

The Newport councilman had ample reason for feeling that the world of government was no longer as before. When he gave the testimony quoted above, the city council had already been enjoined by a state court from cancelling a permit after a promoter proposed substituting a rock group, Blood, Sweat and Tears, for a jazz performer, Sarah Vaughn. A jury was soon to award damages to the concert promoters, finding the city liable for $72,910 in compensatory damages, for they determined that the city's attempt to cancel the permit resulted in the promoters being able to sell less than half of the 14,000 available tickets. More significantly, the jury awarded $200,000 in punitive damages against the city, and assessed liability for an additional $80,000 in punitive damages against the mayor and seven city council members in their personal capacities.[3]

Although the courts that considered the case found that the council's decision to cancel the permit infringed upon the promoter's right of free speech, for which the Supreme Court traditionally has applied strong protection, the case reflects the extent to which liability can arise while officials are exercising their responsibility to govern. The most recurring source of liability under the most recent Supreme Court pronouncements will likely derive from the performance of administrative functions, and in particular from those related to federally sponsored and federally assisted programs. With the present litany of managemental regulation and instruction far beyond any individual's capacity to absorb, misinterpretation and misapplication are inevitable. Local jurisdictions are particularly vulnerable, for virtually every effort of theirs can now be redressed through litigation.

The Supreme Court's 1980 rulings in *Owen v. City of Independence, Maine v. Thiboutot,* and *Maher v. Gagne,*[4] when read together with other recent decisions, enunciate a set of standards under which: (1) local government may be held strictly liable for constitutional violations even though the violations resulted from actions taken in good faith by government officials,, and (2) state and local government officials may be held liable whenever a person has been injured through the administration of any federal-state or federal-local cooperative program, regardless of whether that program is related to civil rights. These cooperative programs can cover both federal assistance and federal regulatory efforts. Furthermore, under these cases, aggrieved persons may pursue claims alleging injury not only in federal courts, but also in state court. Finally, successful plaintiffs in such cases may recover their attorney's fees from defendant officials or from their government.

With Section 1983, the courts, on behalf of citizens, have been drawn into areas that had traditionally been reserved for the executive branch.

The effect of these decisions clearly is to eviscerate the once sturdy bulwark of governmental immunity and expose state and local government officials to a liability they had once thought remote. The rulings are likely to dampen state and local government enthusiasm for taking innovative and adaptive approaches toward program management, for the prospect is the more they exercise ministerial flexibility, the greater the probability their administration of that program will be challenged.

Over the past several years, there has been much federal

The views expressed in the paper are those of the authors.

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rhetoric on devolving authority and responsibility to state and local governments. The objectives are sincere, the initiative is well-intentioned, but the federal government has so far given up little. Concededly, roles and powers that have aggrandized over 50 years are not readily or easily shed. Even this limited beginning is threatened, however, and President Reagan's emphasis on turning programs back to state and local governments may go unrealized, for much of the devolution strategy centers on enhancing the management of federal programs by reducing the duplicate layers of federal and non-federal oversight and operation which presently prevail. These federal schemes for improved management, to a large degree, are predicated on the willingness of state and local government to exercise a major role in administering the use and disbursal of federal monies.[5] The recent Supreme Court decisions, however, now cast serious doubt on whether such objectives are reasonable or even achievable.[6]

The statutory base of such results is Section 1983[7] of Title 42 of the United States Code. Under Section 1983, a person is liable to an injured party when (1) the person acts "under color of any law, statute, ordinance, regulation, custom or usage of any state" and (2) the person deprives any citizen or person in the United States of "any rights, privileges or immunities secured by the Constitution and laws."

Section 1983 was originally enacted as Section 1 of the Civil Rights Act of 1871, and a gestation in the post Civil War and Reconstruction era would hardly seem to bear any direct relationship to the administration of federal assistance programs. Indeed, when this statute was enacted 11 decades ago (when the Congress was clearly concerned with racially discriminatory laws and administration of justice in the South at that time), there was little of what could now be termed federal assistance.[8] But with a judicially infused adaptability which can only be marveled at, Section 1983 has grown into a vigorous presence with such portentous impacts that any scheme for managing federal assistance must now be carefully crafted to avoid transgressing its provisions and inciting the costly and disruptive impact which might then ensue.

With Section 1983, the courts, on behalf of citizens, have been drawn into areas that had traditionally been reserved for the executive branch. And there is no ready remedy for the circumstances in which the executive now finds itself. Indeed, the search for an easy solution is complicated by the pyramidal and synergistic nature of the recent decisions. Not only can citizens sue if they believe their constitutional rights are infringed but they now may pursue legal remedies if their statutory rights are restricted as well. Anticipating such legal recourse and introducing palliative measures is not a simple matter for the government official, as constitutional rights, particularly those derived from the Fourteenth Amendment, are periodically defined and expanded by the courts, and new statutory rights are becoming discovered with great frequency. Under such conditions of uncertainty, it is difficult designing any system of management which can assure officials that reasonable actions and efforts on their part will secure all the rights provided citizens and immunize the official from liability. Returning to the Newport city councilman, the United States Court of Appeals for the First Circuit, in upholding the punitive damage award against the city, reviewed the Supreme Court's recent decisions in Section 1983 cases and stated: ". . . the present state of the law as to municipal liability is such that we cannot with confidence predict its future course. . . ."[9]

This paper addresses three major aspects of the state of governmental immunity. These are: (1) the evolving diminution of state and local government immunity; (2) the rise of Fourteenth Amendment rights; and (3) the growth in implied rights derived from federal statutes. The likely implications of these developments are then assessed with regard to efforts to improve the management of federal assistance programs and to encourage state and local governments to assume greater responsibility in administering federal assistance.

The Evolving Loss of Governmental Immunity

Within this century, there has been a parade of decisions[10] which have steadily circumscribed the bounds of the immunity once possessed by government officials acting in the course of their duties. Where once immunity was virtually absolute, such protection now has been winnowed away to the point of occasional stubble.[11] Within the past half-decade, the decision pace has accelerated, engendering the present sense of concern as to its cumulative effect on the actions and initiative of government officials.

Less than ten years ago, the court initiated what has become a major review of state sovereignty and immunities under 42 U.S.C.§1983 and the Eleventh Amendment.[12] The pattern of decisions is not entirely consistent and there is evidence in both majority and dissenting views of a good amount of judicial skirmishing and "topmanship" by whomever is on the prevailing side on a particular decision.

In the 1974 case of *Edelman v. Jordan*[13] the court declared that the Eleventh Amendment grants no immunity for *states* from prospective injunctive relief in federal court, and, reaffirming an earlier principle, held that state officials could be sued and enjoined for conduct which violated Section 1983. The cost of future state compliance was ancillary.[14] The court overturned a lower court decision requiring the *state* to pay benefits wrongfully withheld under a federal assistance program, asserting that a "suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."[15]

Less than a month later, in *Scheuer v. Rhodes*,[16] a case dealing with the shootings at Kent State University by the Ohio National Guard, the court set forth new standards and liabilities for *state officials*. Now the court ruled that the Eleventh Amendment was not a bar to claims for monetary damages against state officials. As defense to such a claim, however, governors and other state officials were provided with a qualified immunity[17] based upon good faith action.

If *Scheuer* drew some bounds at only those official actions infringing on constitutional rights, the limitation did not last long. In the 1980 Supreme Court decision in *Maine v. Thiboutot*,[18] the extent of prospective liability of state officials for their actions was significantly increased. The Supreme Court in *Thiboutot* ruled that the term "and laws" contained within Section 1983, referred not only to laws pertaining to equal or civil rights, but to all federal statutes. Justice Brennan's majority view was circumspect in describing the implications of the decision, leaving it for Justice Powell's dissent to set forth the probable dimensions. Justice Powell observed that:

> "[There are] literally hundreds of cooperative regulatory and social welfare enactments [that] may be affected. The states now participate in the enforcement of federal laws governing migrant labor, noxious weeds, historic preservation, wildlife conservation, anadromous fisheries, scenic trails and strip mining. Various statutes authorize federal-state cooperative agreements in most aspects of federal land management. In addition, federal grants administered by state and local governments now are available in virtually every area of public administration.
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> * * *
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> "No one can predict the extent to which litigation arising from today's decision will harass state and local officials; nor can one foresee the number of new filings in our already overburdened courts. But no one can doubt that these consequences will be substantial. . . ."[19]

The consequences of *Thiboutot* are indeed immense. No longer can anyone argue that 42 U.S.C.§1983 is limited to cases founded on a violation of the Constitution or the federal laws designed to guarantee civil rights. No longer is there any doubt that anyone can go to federal court and seek redress for their injuries, if they believe that they are denied some benefit, direct or indirect, under the myriad federal laws which give some benefit to or create some obligation for state or local government.

Thiboutot ***exposed what for many had been an overlooked dimension of judicial activity over the past decade—the discovery of implied statutory rights.***

Furthermore, under *Thiboutot* and other Supreme Court cases, liability can arise whenever state or local government officials misinterpret the phalanx of federal rules and regulations which follow from the laws that give benefits and create obligations. Actions in violation of these laws, rules, and regulations can be enjoined. Compensatory and perhaps punitive damages can be awarded. Benefits can retroactively be restored.

In addition, the Supreme Court held on the same day in the companion case of *Maher v. Gagne* that attorney's fees can be awarded to successful litigants in all cases brought under Section 1983, whether founded on the Constitution or on other federal laws.[20] The court applied the decision in *Maher* to the infringement of statutory rights under *Thiboutot*. The "Urban Lawyer," in its annual review of local government law, argues that this might be the most important consequence of *Thiboutot*.[21] Picking up on Justice Powell's dissent, the "Urban Lawyer" predicts that the liberal standards for allowing attorney's fees in Section 1983 cases will lead to an even greater increase in the numbers of these cases.[22] In 1979, there were nearly 25,000 Section 1983 filings in federal courts, as compared to 261 in 1961.[23]

This sequence of cases affecting state government and state officials bypassed local jurisdictions until 1978. During this time, perhaps they had some misplaced sense of sanguinity, for in 1961 the court had addressed the possibility of municipal liability in the case of *Monroe v. Pape*.[24]

That milestone case produced two results. The first was to expand the application of Section 1983 by allowing a remedy to be sought in federal court even though a state remedy existed, and by also indicating an officer of the state need only be vested with state power to find liability, even if the officer exceeds instructions. The second was to sustain the longstanding immunity of local governments from liability under 42 U.S.C.§1983.

The decision in *Monroe* stood for 17 years until *Monell v. New York City Dept. of Social Services*,[25] when the court consciously reversed its holding in *Monroe* and now found that local governments could be liable for violations of Section 1983. In *Monell*, the court was faced with a challenge to a city policy which required pregnant employees to take maternity leave after the fifth month of pregnancy. The court determined such a policy violated rights secured by Section 1983,[26] and denied the city an absolute immunity defense under Section 1983.

New York City had not raised a defense of a qualified immunity, for the city assumed it was immune from liability under the *Monroe* decision. Two years later, such a qualified immunity was raised in *Owen v. City of Independence*[27] but to little avail. The court's decision last year in *Owen* all but eliminated immunity for local government in Section 1983 cases, although local officials retain a qualified good faith immunity. In effect, the ruling allows plaintiffs to seek the deeper financial pocket.

The court in *Owen* relied in large degree on the fact that municipal corporations, unlike states, did not have common-law immunity. The court agreed to retain a qualified good faith immunity for the local official, based on the proposition that public officials might hesitate to discharge their duties if faced with the prospect of personal monetary liability,[28] but such does not exist where relief is borne by the governmental unit rather than by the officeholder. Underlying this view is the degree of liability the court now imposes on local governments—that of strict liability[29]—which would be a formidable cloud if such were similarly positioned above the head of the local official.

In *Owen*, the court at some length categorized the type of local actions to which a strict liability standard might be applied. Sovereign immunity no longer exists for those local government actions which are proprietary or ministerial in nature. Proprietary acts occur when a government acts like a private corporation; ministerial acts occur when a government carries out public policy.[30]

In what may be the most unsettling aspect of *Owen* for local government officials, the Supreme Court in *Owen* held that government officials are expected to act in accordance with Fourteenth Amendment rights at all times. On the surface that proposition is constitutionally unassailable. As a practical matter, however, it means that a city can be found strictly liable for any newly enunciated interpretations by the Supreme Court as to what the Fourteenth

Amendment means. As a practical matter, it means that the City of Independence, Missouri was found liable because its city manager had fired the police chief and did so in violation of certain constitutional due process rights, which were not enunciated by the Supreme Court until ten weeks after dismissal.

With *Thiboutot, Owen,* and their antecedents, the court has made it fairly easy for an aggrieved citizen to pursue a cause of action against a state and its officials, and even easier to proceed against local government. Federal courts may impose injunctive relief directing future actions on the part of states, local governments, or their officials, with regard to violations of constitutional rights or statutory rights. Federal courts may impose compensatory damages against a local government, or a state or local government official for violations of individual rights secured by the Constitution or by federal statute.[31] State courts may impose compensatory damages against a state, local government, or their officials for violations of constitutional or federal statutory rights.

The immunity afforded to state or local government officials for violations of constitutional or statutory rights is that of a qualified immunity based on good faith action. A local government has no immunity. Absolute sovereign immunity has been retained for judges, prosecutors, and legislators.[32] The disparity in legal vulnerability which presently exists between state and local government may have a significant political effect, as it may concentrate ministerial powers at the state government level and substantially reduce local government's role in future federal assistance programs.

The Ascension of Fourteenth Amendment Rights

Section 1983 has long been viewed as the statutory means for enforcing the provision of individual rights secured by the Fourteenth Amendment.[33] For a right to exist it must be enumerated, but the court has never attempted to define all the individual privileges or immunities bestowed by the Fourteenth Amendment. Where it has done so, these include most but not all of the constitutional "rights" listed in the Bill of Rights as well as certain other rights added over time.[34]

The most likely sources of governmental liability under the Fourteenth Amendment, recognizing the more common areas of citizen-government interaction, are those arising from deprivation of liberty and property benefits without due process of law. A government's susceptibility is accentuated by reason that liability may be found even where the deprivation or failure arose from error or ignorance on the part of a government official, and because of the great number of financial transactions and determinations which occur annually between government and citizens.

In *Owen*, the right impaired was a liberty right. It was the right of a government employee not to have false and defamatory impressions created in the course of having his employment publicly terminated. This right was first stated in *Board of Regents v. Roth,*[35] the case decided ten weeks after Owen was fired.

Benefits provided by federal assistance programs can be construed as a "property right" and thus covered under the Fourteenth Amendment. Such benefits, however, are not an absolute entitlement. Due process "rights" in federal assistance programs were enunciated for the most part in the 1970 decision of *Goldberg v. Kelly*, although the precise scope of these rights was later eased in 1976.[36] The due process rights include: notice (where a benefit is to be administratively terminated, beneficiaries must be given notice which details the reasons for the proposed termination and affords them suitable opportunity to prepare for a hearing); impartial tribunal, confrontation and cross-examination; decisions on the record; and counsel (a government agency must allow a recipient of benefits to be represented and assisted by counsel).[37]

. . . government bureaucracy may turn apprehensive and become more bloated, less effective, less timely, and more concerned with the impact of any action upon itself than on the recipients of the assistance it provides.

It is the prospective expansive nature of Fourteenth Amendment constitutional rights that complicates the immunity and liability of state and local governments and their officials. This is particularly true because in 1976, in *Fitzpatrick v. Bitzer,*[38] the Supreme Court held that the Fourteenth Amendment imposed limits on state immunity under the Eleventh Amendment. Statutes enacted by the Congress (in this case Title VII of the Civil Rights Act of 1964 as applied to state retirees who were discriminated against) may abrogate state sovereign immunity under the Eleventh Amendment. As the Supreme Court continues periodically to define Fourteenth Amendment rights, existing statutorily-derived benefits and rights may be brought under the constitutional umbrella and a state's immunity further eroded.

The Growth of Federal Statutory Rights

Thiboutot exposed what for many had been an overlooked dimension of judicial activity over the past decade—the discovery of implied statutory rights. Statutory rights explicitly set forth in a law are readily determined and presumably understood. What is novel is the readiness of present-day courts to search, on behalf of litigants, for rights which are not immediately obvious from reading the statute, but which can be found only after scrutinizing legislative history and intent.[39]

This willingness has initiated a veritable inundation of litigation from which courts have yet to dig free. A number of private cause of actions arising from federal statutes are to be argued during the 1980 term of the Supreme Court and are likely to be decided this year. One set of cases involving ocean dumping[40] introduces the possibility of governmental liability for damages resulting from the permitted dumping of municipal pollutants off the coast of New Jersey. These cases may measure the degree a government failure (where it has responsibility to do so) to regulate adequately a source or cause of injury to a party can induce governmental liability for resulting damages under Section 1983. Other cases will test whether implied statutory rights exist under Davis-Bacon (covering the wage rates to be paid labor employed on federally-funded construction) and the dimensions of handicapped person rights under Section 504 of the Rehabilitation Act of 1973.

Resorting to a public causes of action remedy to secure statutory rights is not easy. In *National Railroad Passenger Corp. (AMTRAK) v. National Assn. of Railroad Passengers,*[41] the court refused in 1974 to concede the association had statutory rights to intervene judicially in a proposed suspension of passenger train service. The court shrunk away from a vision of myriad plaintifs (in a proliferation of suits) interposing any and all federal district courts in place of state and federal regulatory bodies, with the further prospect of conflicting judgments (perhaps even with regard to the same train) and great delay and cost in carrying out the suspension.[42]

The Forthcoming Involvement of State Courts

The complicating feature of prospective state court involvement may have important implications for any national effort to administer, on a consistent basis, federal assistance programs. In 1947, the court enunciated a general rule that where "an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court."[43] This rule was reinforced by the court in 1980 in *Martinez v. California,*[44] where it held that claims alleging violations of Section 1983 may be heard in state courts. The court reserved the question of whether state courts are required to entertain Section 1983 actions, but added, "We note that where the same type of claim, if arising under state law, would be enforced in state courts, the state courts are generally not free to refuse enforcement of the federal claim."[45]

The judicial labyrinth of allowing and having state courts adjudicate Section 1983 statutory claims has not been sufficiently explored, but enough omens become manifest from an initial foray into the annals of existing law to introduce a foreboding sense of turmoil and confusion. The issues of standing, supremacy, jurisdiction, and full faith and credit, indicate the potential for a welter of conflicting state court determinations. They raise the spectre of state courts assessing the adequacy of federal requirements when they are applied by state or local governments and of having federal courts subsequently being asked to enjoin any "unsatisfactory" decisions of state courts.

A Discouraging Damage Report; Mending May Be Difficult

One immediate concern of the federal government focuses on identifying available and practicable means for limiting the cumulative effect of these decisions on the management of federal assistance programs. It also involves reassuring prospectively beleagured state and local government officials that initiative and flexibility will not be rewarded with litigation.

The effects on the government official can only be anticipated at this juncture; the court decisions are too recent and the true consequences are yet to be realized.[46] Certain results are likely to occur, however. First, much more administrative inefficiency may be introduced into the operation of assistance programs. When confronted with the prospect of culpability, managers can become quite resourceful at introducing protective measures to diminish their liability. These measures, in the form of elaborate procedures, extensive review and coordination, or manifold levels of decision and approval (all of which may sound managementally proper), could induce administrative inertia, delay, and wasted resources.

There is a tendency, as evidenced by the medical profession increasing the nature and extent of diagnostic testing to reduce the possibility of malpractice liability, to adjust the level of performance to respond to the exceptional or occasional situation, rather than establishing procedures which relate to the usual and normal circumstance. Under such a strategy, every recipient of federal assistance may then receive a standard of administrative performance designed for the exception, and which is excessive for the needs of most. Simply, government bureaucracy may turn apprehensive and become more bloated, less effective, less timely, and more concerned with the impact of any action upon itself than on the recipients of the assistance it provides.

Engendering a second effect is the degree of delegation which occurs in most government bureaucracies. The government official made a party to most Section 1983 actions is often the highest elected or appointed official having responsibility over the function whose actions precipitated the alleged injury. In very large bureaucracies, such as those servicing social assistance programs, the actions of subordinate officials might be beyond the direct cognizance of the person in charge.[47] But this may not alleviate the superior's culpability. In *Scheuer,* the governor of Ohio, while ordering the National Guard with weapons to the university campus, was not on-site or in direct command of the troops when they began to fire. Yet the plaintiffs successfully made him a culpable defendant.

The third significant effect is induced more by the party not present as a defendant in most of these Section 1983 actions—the federal government. Presently, the federal government retains much more sovereign immunity than state or local governments. This disparity in burden-sharing and liability between the federal government on one hand and state and local governments on the other, can foment ill-will, insensitivity, and a general and understandable reluctance by state and local government officials to assume responsibilities for cooperative programs when the legal exposure is targeted on them.[48]

A fourth consequence is a developing weariness of government officials who discover most of their time and energy is sapped in responding to legal claims and defending their actions, rather than in directing and overseeing tasks and subordinates. They may come to view their profession as one which has been captured by litigants and snared by lawyers, and choose to depart to more reasonable and calmer occupations. This effect may be the most inevitable of all, for the court's allowance for recovery of attorney fees is surely an incentive for many members of the legal profession not to discourage petitioning plaintiffs; particularly those whose claims and damages might not ordinarily be commensurate with the time and cost which would be expended to pursue them to a fruitful conclusion.[49]

A corollary federal concern reflects the possibility for increased state court determinations as to whether administrative procedures and practices have been adequate to protect the constitutional or statutory rights of citizens. Legal commentators[50] have elaborated on a state judiciary whose caseload, experience, and traditional orientation may make it particularly ill-suited for such a task. Yet, if the number of Section 1983 actions increase to the extent many fear, and with no financial penalty associated with pursuing an action in state court, plaintiffs may rely more and more on state courts as their forum of choice. Certainly, the federal government cannot be enchanted with a prospect of a proliferation of private causes of action alleging violations of federal statutory rights being brought in state courts, with the state courts in 50 quite disparate jurisdictions being asked in many of these cases to perform feats of statutory construction as to what Congress truly intended. Greatly varying interpretations will indubitably occur, and much time and legal resources be expended in subsequent efforts to transform these decisions into a common, consistent result.

> ***. . . state and local officials may now choose not to administer federal assistance programs beyond what they are absolutely compelled to do.***

There is one other major federal government concern, and that is a perception—formed not by the legal consequences of these decisions, but from an appreciation of existing attitudes and tendencies on the part of state and local government—that state and local officials may now choose not to administer federal assistance programs beyond what they are absolutely compelled to do. Even before these decisions, there was occasional rebelling over federally-imposed procedures and requirements, and, infrequently, a state or local government would even decline federal assistance on the belief the burden was not commensurate with the benefit.

In many assistance programs, state and local government administration is a voluntarily-assumed responsibility undertaken to allow the benefits of assistance to be enjoyed by the citizens of a community or state. Often, the state or local government is not compensated for the administration it provides, or if federal funds can be used for such a task, they likely will not fully cover all the costs which are incurred. Given the current environment, there seems little doubt that the lessened standard of immunity which is now allowed, the extensive scope of potential liability, and the prospective judicial confusion and uncertainty will all combine to foster much more resistance on the part of state and local governments toward assuming further administrative or managemental responsibilities for federal assistance, and may spur them to return some or many of the responsibilities they took on in the past.

Such a forecast breeds much federal consternation. Not only are national objectives to have state and local governments assume additional responsibilities for managing assistance programs now contravened, but a reversion of administrative responsibility from state and local governments back to the federal bureaucracy would find, in times of manpower constraints and tight budgets, that latter institution ill-prepared to fulfill such a newly-assigned role.

What to Do?
A Limited Number of Possibilities

Conceding the effects of *Thiboutot* and *Owen* on existing government institutions and their manner of operation, is not to agree that remedial measures are unavailable or the damage is irreparable.

The most satisfactory remedy may be legislative action. The court in *Thiboutot* seemed to invite the Congress to reverse the decision in *Thiboutot*.[51] Bills have been introduced this session to limit the applicability of Section 1983 and to restore some immunity to local government.[52] Any legislation must be carefully drafted, however, for the principal purpose of Section 1983 is to secure constitutional rights, and is therefore a subject that must be fully and carefully considered and debated. Furthermore, given the widely-encompassing nature of constitutional rights to which federal assistance can now be subordinated, it will be difficult to craft a substantive legislative solution which is of much aid to state and local governments.

The possibility of fashioning judicial relief seems remote. The preemptive strike tactic was tried in *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*[53] in which the city and city council alleged that land use regulations and regional transportation plans were unconstitutional, as they represented a taking of property without compensation, and discrimination as between property owners. The city and council members stated they would be exposed to civil liability under Section 1983 for carrying out an unconstitutional law, and sought relief. The city and council members were unsuccessful with this argument in the court of appeals, and the Supreme Court denied certiorari last December.

An approach which could be considered and most likely rejected would introduce a more rigid system of federal requirements in an effort to reduce the exposure of state and local officials.[54] For the federal government to increase the scope and nature of federally-imposed requirements would contradict several major philosophical maxims of recent years. These are: programs should be decentralized in their administration, and state and local governments should be provided with increased flexibility in managing federal assistance. To a great degree, such initiatives have responded to the inculcation of recipients, government officials, academicians, and pundits as the only sensible approach.[55]

Yet another recourse where judicial relief is unlikely involves the doctrine of federal preemption of state and local government actions. Preemption fails because of the very nature of federal assistance itself—the sense of a shared endeavor between a federal agency and a state or local government counterpart.

The concept of cooperative federalism, which underlies joint federal-state-local efforts is the antithesis of preemption. Preemption predicates a manifestly clear congressional intent to exercise federal jurisdiction under powers granted exclusively to the Congress. The most common areas of federal preemption of state action are commerce, copyright, patent, foreign affairs, and immigration.

The general principles of cooperative federalism were initially laid out by the court during the Depression era[56] and have been extended in a number of decisions involving federal assistance efforts since that time. These decisions provide legitimacy to federally imposed requirements, regardless of how onerous they may appear to the party having to administer or enforce them; and allow a state or local government to introduce complementing regulations of its own.[57]

The decisions enunciating the concept of cooperative federalism allow a strategy which would ameliorate the impact of *Thiboutot* and *Owen* by substantially increasing the degree and type of federally imposed administrative requirements contained in the regulations for federal assistance programs. Surely, such a strategy would be anathema to most of the principal officers of government, contravening as it does the general thrust of most managemental initiatives of the past decade.

Putting Things in Order

If legislative amendment appears unpromising, judicial remedies unlikely, and a buffering layer of additional requirements seems unacceptable, a few possible actions remain. Education, model regulations and procedures, communication, and delegation appear feasible. These efforts concentrate on making sure the state or local government official is aware of what is expected, and what must be done to protect the various rights of citizens. Hopefully, such awareness and the introduction of reasonable measures to accommodate these rights will minimize litigation and secure some measure of immunity as a result of good faith action. Indeed, Eric Schnapper, an attorney for the parties bringing the *Monell* case, argues that properly structured delegations of authority may be a means of decreasing liability.[58]

A second possible adjustment which might be examined is to allow as an eligible cost under federal assistance programs, the cost of litigation and certain damages. Such eligibilities do not presently exist as a matter of course, and for state and local governments to bear the cost of defense litigation and plaintiff attorney fees is a troublesome burden. Any such allowance, particularly for damages, ought to be carefully defined to preclude abuse and the predilection which might develop to be generous with awards, with the federal government being seen as possessing the deepest pocket of all.

A more radical approach would be to introduce a strategy of federal indemnification, similar to what exists for nuclear power facilities under the Price-Anderson Act.[59] There, the federal government has statutorily established a maximum public liability for public utility owners arising from any nuclear catastrophe. All liability above the maximum is borne by the federal government under an indemnification scheme. An indemnification scheme covering Section 1983 judgments could cap the maximum liability for individual programs or governments, and could assign priorities among the various classes of damages so that those which are the most severe and readily computable would receive first consideration.

Unlike William Ernest Henley's unsung hero in "Invictus,"[60] state and local officials are not masters of their fate. They do not know what clutch of circumstances will bring them before the courts in a 42 U.S.C.§1983 lawsuit as the Supreme Court wrestles over the meaning and application of the rights, privileges, and immunities secured by the Constitution and other laws of the United States. If past history is any guide, there will evolve newly defined rights for individuals with a commensurate loss of traditional prerogatives and immunities for state and local government.

Notes

1. *Fact Concerts, Inc. v. Newport*, 626 F.2d 1060, 1066 (1st Cir. 1980).
2. Twenty centuries past, the Roman historian Livy exclaimed, "We feel public misfortunes only so far as they affect our private circumstances, and nothing of this nature appeals more directly to us than the loss of money."
3. *Fact Concerts, Inc. v. Newport*, 626 F.2d at 1063. When faced with a new trial on the damages issue, Fact Concerts accepted a remittitur of $125,000 with respect to punitive damages against the city. The Supreme Court has recently granted certiorari on this case, 49 U.S.L.W. 3443 (Dec. 16, 1980), specifically to examine whether punitive damages may be assessed against local government officials in cases brought under 42 U.S.C.§1983. The case should be argued this term.
4. *Owen v. City of Independence*, 445 U.S. 622 (1980); *Maine v. Thiboutot*, 100 S. Ct. 2502 (1980); *Maher v. Gagne*, 100 S.Ct. 2570 (1980).
5. The Office of Management and Budget in its 1980 report to the Congress, *Managing Federal Assistance in the 1980's*, defined assistance as encompassing "Direct payments, grants, cooperative agreements, subsidies, loans, loan guarantees, insurance, services, information, and property donations." (Executive Summary, p. 7.)
6. The Harvard Law Review, in its review of the 1979-1980 Supreme Court term, asserts that state and local government officials must be held liable for injuries arising out of the administration of federal programs. The review postulates that: "The practical need for a federal cause of action supports the Court's results as well. . . . To the extent that federal requirements either burden state and local budgets, as in *Thiboutot*, or otherwise offend state and local administrators, such officials possess an incentive to resist the federal man-

date. Given that state administrators are unlikely to express their disagreement by withdrawing completely from cooperative ventures, it is quite possible that objectionable federal guidelines will simply be ignored at the implementation stage. . . . Automatic state compliance with federal directives cannot be assumed. The need for a process through which state deviance can be attacked is substantial" [footnotes omitted]. *The Supreme Court, 1979 Term,* 94 Harv.L.Rev.1, 228 (1980).

7. 42 U.S.C.§1983 (1974). Section 1983 provides that "Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress." (All references to Section 1983 in this article are concerned only with 42 U.S.C.§1983.)

8. One of the federal initiatives involves use of a "certification" process, under one form of which, a state or local government would assure federal agencies that their management systems, statutory provisions, or administrative procedures satisfy federal objectives and can be used in lieu of a replicate set of procedures and systems established solely to comply with federal requirements.

9. 626 F.2d at 1067.

10. Earlier decisions began with *Ex Parte Young,* 209 U.S. 123 (1908), when the Court held that although prohibited from giving orders directly to a state, federal courts could enjoin state officials in their official capacities. Over two decades later, in *Sterling v. Constantin,* 287 U.S. 378 (1932), the Supreme Court decided no absolute immunity for state officials existed where constitutional rights were being violated. The next major decision in this area did not occur until 1964, when in *Parden v. Terminal Ry. of the Alabama State Docks Dept.,* 377 U.S. 184 (1964), the court held the Eleventh Amendment was no bar to suit brought against a state which owned and operated a railroad in interstate commerce. States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce, and by extension waived any sovereignty which might stand in the way of congressional regulation by statutory declaration of the conditions of particular commerce.

11. It is long settled that generally in these cases, one cannot sue the federal or state government without its consent but proceeds against a federal, state or local government official, even though the government may eventually pay the claim or take the action ordered by the court. The Supreme Court in *Quern v. Jordan,* 440 U.S. 332 (1979), declared a state is not a person for the purposes of Section 1983. This declaration precludes states from being brought into federal court as defendants.

12. The Eleventh Amendment specifies that "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

13. *Edelman v. Jordan,* 415 U.S. 651 (1974). In the case of *Employees of the Dept. of Public Welfare v. Missouri Dept. of Public Health and Welfare,* 411 U.S. 279 (1973), the Court held that state participation in a federal program could not in itself be taken to signify consent on the part of the state to be sued in federal court. If Congress does not intend for states to waive their immunity, they retain it.

14. The cost of compliance is generally accorded secondary weight in the course of these decisions. When considered, it is generally a point raised in dissent.

15. 415 U.S. at 663.

16. *Scheuer v. Rhodes,* 416 U.S. 232 (1975).

17. *Id.* at 247. The standard enunciated in Scheuer allowed that "[A] qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." The court in *Procunier v. Navarette,* 434 U.S. 555,562 (1978), indicated a qualified good faith immunity defense was "unavailable if the constitutional right allegedly infringed . . . was clearly established at the time of [the] challenged conduct, if [the officials] knew or should have known of that right, and if they knew or should have known that their conduct violated the constitutional norm."

18. *Maine v. Thiboutot,* 100 S.Ct. 2502 (1980).

19. *Id.* at 2513, 2514.

20. 100 S.Ct. at 2574.

21. Freilich et al., *1979-1980 Annual Review of Local Government Law: Municipal Liability and Other Certain Uncertainties,* 12 Urban Lawyer 577,589 (1980).

22. Freilich, at 593.

23. Freilich, at 593, referencing Powell's dissent in *Thiboutot.* A study of prisoner suits brought over a period of several years during the 1970s under §1983, indicated that nearly three states, Florida, Virginia, and Texas, accounted for nearly a third of the filings. All Southern states had 32 percent of the civil population, 47 percent of the prisoners, and 56 percent of the §1983 suits. While definitive conclusions as to the causes of the disproportionate filing have not been arrived at, there is some indication that the relative number of §1983 suits may depend on the perceived degree of social deprivation, the relative extent of onerous conditions when such are contrasted to comparable environments elsewhere, the success or existence of good administration, and the introduction of effective grievance mechanisms other than the courts. Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in Federal Courts,* 92 Harv.L.Rev. 610, 615 (1979).

24. *Monroe v. Pape,* 365 U.S. 167 (1961).

25. *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978).

26. *Id.* at 694. The court stated that "[if government, in the execution of its] policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury [then] the government [can be held] responsible."

27. *Owen v. City of Independence,* 445 U.S. 622 (1980).

28. Consider the standard presented in *Wood v. Strickland,* 420 U.S. 308 (1975), a decision where a qualified good faith immunity was provided school board members who suspended high school students for spiking the punch. The qualified good faith immunity standard in *Wood* specifies, "The official must be acting sincerely and with a belief that he is doing right, but an act violating a . . . constitutional right can be no more justified by ignorance or disregard of settled indisputable law . . . than by the presence of actual malice." . . . "[A] school board member is not immune from lia-

bility for damages under Section 1983 if he knew or reasonably should have known that the action he took within the sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student." *Id.* at 321.

Justice White's opinion in *Wood* promised, "That is not to say that school board members are "charged with predicting the future course of constitutional law. . . . A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his actions cannot reasonably be characterized as being in good faith." *Id.* at 322.

A pending set of certiorari petitions before the Supreme Court, arising from the appellate decision in *Paxman v. Campbell*, 612 F.2d 848 (4th Cir. 1980), seeks review of whether the strict liability standard of *Owen* should now be applied to school boards.

29. As the Georgia Law Review noted, this degree of strict liability for this sort of injury is unique in tort law. In most of tort law, strict liability is reserved for conduct completely within the control of the actor and which is so inherently dangerous that society imposes unconditional liability as a cost of carrying on this activity. 14 *Georgia L. Rev.* 613 (Spring 1980).

The possible pernicious extent of this liability may be fathomed once the court issues a decision this term in *Taylor v. Parratt*, 620 F.2d 307 (8th Cir. 1980) decision without opinion, *cert. granted*, 49 U.S.L.W.3289, in which the question is posed as to whether simple negligence is sufficient for judgments under §1983 and whether certain property claims are so de minimis so as not to be protected under §1983.

30. Local governments retain their sovereign immunity when they act in a governmental or public capacity. They also retain sovereign immunity for discretionary acts, such as legislative actions; i.e., one may not successfully sue a city because it failed to enact a particular ordinance. Any local government immunity is extended (in the case of governmental acts) only to the extent that a state does not allow itself to be sued, for this immunity is a shared immunity with the state.

31. It is some measure of the semantic tussle which is often engaged in during the course of legal interpretation, that the decision in *Thiboutot* never reached the question of whether the Congress might set aside a state's immunity under the Eleventh Amendment in non-constitutional cases. Justice Brennan noted that states, appearing as amici in the *Thiboutot* case, suggested the decision in *Hutto v. Finney*, 437 U.S. 678 (1978), (a case involving conditions in the Arkansas prison system), had left open the issue of such a congressional exclusion. To address this point directly would have necessitated a relook at *Quern v. Jordan*, decided in 1979, and as *Thiboutot* conveniently was an action originally brought in state court, the Court was not forced to consider the point. As Justice Brennan almost cavalierly remarked, "No Eleventh Amendment question is present, of course, where an action is brought in state court since the amendment, by its terms, restrains only "[t]he Judicial power of the United States." 100 S.Ct. at 2506. The distinction between the state and an official of the state, while not a factor in *Thiboutot*, can also be important, if only from the standpoint of latching onto the appropriate defendant if the litigation is to proceed. A successful pleading joins a government official as a party in actions brought in federal court, thus precluding a state government defendant from successfully raising an Eleventh Amendment immunity defense.

32. The court has had several occasions to rescind this level of immunity but has declined to do so. In a case decided at the beginning of the 1980 term, *Dennis v. Sparks*, 49 U.S.L.W. 4001 (November 17, 1980), involving a conspiracy with an allegedly corrupt judge as one of its members, the court stated that "to act under color of state law for §1983 purposes does not require that the defendant be an officer of the state. It is enough that he be a willful participant in joint action with the state or its agents." The allegedly corrupt judge was allowed to retain absolute sovereign immunity, but the individuals who bribed the judge, to issue an illegal injunction which deprived property without due process of law, were not cloaked with a similar shield. Concededly, the judge's act, while illegal, was an official act within his statutory jurisdiction.

In *Marrero v. Hialeah*, 625 F.2d 499 (5th Cir. 1980), a prosecutor was not provided with absolute immunity for §1983 violations when his actions were outside the judicial arena. (The prosecutor had flamboyantly publicized and led a police search for stolen articles.)

33. Section one of the Fourteenth Amendment provides that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law."

34. Rights not included generally pertain to judicial areas (jury trial in civil cases, bail, etc.) and the right to bear arms and not to quarter troops. Rights which are covered by the Fourteenth Amendment and that are most likely to be infringed by state or local governments include the First Amendment rights of free exercise of religion, speech, press, assembly, and petition; Fourth Amendment rights against search and seizure; Fifth Amendment right of just compensation; and Eighth Amendment protection against cruel and unusual punishment.

The elaboration of Fourteenth Amendment rights beyond those in the Bill of Rights began in 1873 when the court enumerated several privileges as protected against state encroachment and "which owe their existence to the federal government, its national character, its constitution or its laws." These 'new' rights included access to the seat of government, and to seaports, subtreasuries, land offices, and courts of justice; use of navigable waters of the United States; the ability to pass freely from state to state; entrance onto public lands; to carry on interstate commerce; and to acquire and retain property.

35. 408 U.S. 564 (1972).

36. *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Matthews v. Eldridge*, 424 U.S. 319 (1976).

37. As can be seen in *Owen v. City of Independence*, due process rights extend to other areas, such as termination of employment. Courts generally assign greater weight to benefits presently received than to prospective benefits. The court recently ruled that citizens are not always automatically entitled to receive benefits. In *Harris v. McRae*, 100 S.Ct. 2671, 2688 (1980), Justice Stewart, writing for the majority in this abortion case, stated, "Although the liberty protected by the Due Process clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a dramatic change in our understanding of the Constitution."

38. 427 U.S. 445 (1976).

39. In *Davis v. Passman*, 442 U.S. 228,241 (1979), Justice Bren-

nan explained the nature of statutory rights, saying, "[T]he question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution.

"Statutory rights and obligations are established by the Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine who may enforce them and in what manner. For example, statutory rights and obligations are often embedded in complex regulatory schemes, so that if they are not enforced through private causes of action, they may nevertheless be enforced through alternative mechanisms, such as original prosecution, . . . or other public causes of action." (Emphasis original.)

The landmark decision of *Cort v. Ash*, 442 U.S. 66,79 (1975), set forth a four-part test of whether a private cause of action lies allowing a plaintiff to pursue an implied statutory right. "In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff one of the class for whose especial benefit the statute was enacted, . . . —that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law."

"[I]n situations where it is clear that federal law has created a class of person [with] certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling." (*Id.* at 82; emphasis original.)

40. *National Sea Clammers Assn. v. New York*, 616 F.2d 1222 (3rd Cir. 1980), *cert. granted*, 49 U.S.L.W.3289 (Oct. 21, 1980).

41. *National Railroad Passenger Corp. (AMTRAK) v. National Assn. of Railroad Passengers*, 414 U.S. 464 (1974).

42. Another indice of judicial moderation can be found in the award of damages under §1983 actions. The court, in *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978), refused to allow retroactive damages because of the potential impact which might be placed on the economy as a result of a major change in rules affecting insurance and pension plans. The reasoning in *Manhart* was further adapted by a Court of Appeals in *Gurmankin v. Costanzo*, 626 F.2d 1115 (3rd Cir. 1980), which allowed the award of retroactive damages where there was no major financial impact, as in that case—reversing a school system's denial of employment to a blind teacher because the decision did not extend to many similarly-situated individuals.

43. *Testa v. Katt*, 330 U.S. 386 (1947).

44. *Martinez v. California*, 100 S.Ct. 533 (1980). In *Martinez* (at 558), the court posited that "A [State] immunity statute does not control a [1983] claim even though the federal cause of action is being asserted in the state courts," and endorsed a Seventh Circuit ruling that "conduct by persons acting under color of state law which is wrongful under 42 U.S.C.§1983 . . cannot be immunized by state law." *Id.* at 558. The court reached a similar finding in *Ferri v. Ackerman*, 100 S.Ct. 402 (1980), a case involving a federal court-appointed counsel in a trial in federal court who was subsequently sued in state court by the convicted defendant for malpractice.

45. *Martinez v. California*, 100 S.Ct. at 558.

46. Since *Thiboutot* over 400 §1983 cases have been filed against the city of New York. News stories indicate some elected officials are all too aware of their potential liability. Two selectmen in one Massachusetts town indicated they would resign because the board of selectmen failed to dismiss the town police chief after receiving allegations of his misconduct. The resigning officials asserted the board had been put on notice with regard to the chief's propensities, and any future misconduct on his part could find a court holding the board-members personally liable for any damages arising from the misconduct. Ironically, if the police chief had been dismissed without being accorded due process, the board could have been held liable under *Owen*.

Not all commentators are so apprehensive. See *The Supreme Court, 1979 Term*, 94 Harv. L. Rev. 230. However, any forecast of the level of litigation must examine the combined impact of these decisions; for example, the strict liability holding of *Owen* meshed with the almost incalculable dimensions of potential statutory rights litigation as allowed by *Thiboutot*.

47. Some solace may be gained if courts apply a respondeat superior defense: that is there is no liability on the part of the master for torts committed by his servant in the course of his employment.

48. Generally, the sovereign immunity of the federal government has not been affected by the court decisions of the last term. Federal officials, however, are provided with an immunity based on good faith action. The court in *Butz. v. Economou*, 438 U.S. 478 (1978), held that federal officials possessed only qualified immunity if they violate an individual's constitutional rights.

As Justice Powell remarked in *Thiboutot* at 100 S.Ct. 2514, "Moreover, state and local governments will bear the entire burden of liability for violations of statutory 'civil rights' even when federal officials are involved equally in the administration of the affected program. Section 1983 grants no right of action against the United States, and few of the foregoing cooperative programs provide expressly for private actions against their terms. . . ."

Again, the effects on the functioning of government seem to carry little weight in sovereign immunity decisions. Consider the lament of Justice Rehnquist, "My biggest concern, however, is not with the illogic or impracticability of today's decision, but rather with the potential for disruption of Government that it invites. The steady increase in litigation, much of it directed against government officials and virtually all of which could be framed in constitutional terms, cannot escape the notice of even the most casual observer." *Butz* at 526; dissenting opinion. Professor Davis, in *Administrative Law Treatise* (1978 Supplement), faults the majority opinion in *Butz* for the lack of discussion on the 'potential disruption' point and recites (with seeming approval) the now discarded standard used by Judge Learned Hand, where there is a balancing of "the evils inevitable in either alternative" and a belief that it is "in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retribution." *Gregoire v. Biddle* 177 F.2d 579,581 (2nd Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

49. Justice Powell, in *Thiboutot*, 100 S.Ct. at 2514, surveyed the prospect: "Even when a cause of action against federal officials is available litigants are likely to focus efforts upon state defendants in order to obtain attorney's fees under the liberal standards of 42 U.S.C. 1988." Justice Powell joined

Chief Justice Burger and Justice Rehnquist in a partial dissent to *Maher v. Gagne*, 100 S.Ct. 2570 (1980) (dissenting opinion), decided on the same day as *Thiboutot*, in which the court held that attorney's fees could be recovered by a prevailing plaintiff in statutorily-based cases. In *Maher*, the court unanimously declared such fees were recoverable for constitutionally-based litigation.

50. B. Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977).

51. Justice Brennan in *Thiboutot* remarked, "Petitioners' arguments amount to the claim that had Congress been more careful, and had it fully thought out the relationship among the various sections [footnote deleted], it might have acted differently. That argument, however, can best be addressed to Congress, which, it is important to note, has remained quiet in the face of our many pronouncements on the scope of §1983." 100 S.Ct. at 2506.

52. For example, Senator Hatch (R-Utah) has introduced two bills, S-3114 and S-3115. The thrust of legislative amendment efforts seems to be directed toward the statutory rights liability of *Thiboutot* and the strict liability of *Owen*.

53. *South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir. 1980) *cert. denied* 49 U.S.L.W. 3427 (Dec. 9, 1980).

54. A strategy to buffer state and local governments (and their officials) by declaring them to be agents of the federal government in the course of their administration of federal assistance programs appears futile. In *U.S. v. Orleans*, 425 U.S. 807, 815 (1976), a unanimous court held that a non-profit recipient of federal assistance was not an agent of the United States; "the test being not whether the . . . agency receives federal money and must comply with federal standards and regulations, but whether its daily operations are supervised by the federal government."

55. Added requirements may deliver more than they promise. In a variant of the Yossarian syndrome, the courts may have conceived the unfortunate paradox that the more a state or local government circumscribes the discretion of their officials by statute or regulation, the more the Fourteenth Amendment may be invoked to require procedural regularity. But if the state or local government accords wide and *unreviewable* discretion to the officials, the government may escape the challenge. The task then falls to the government official who must gauge whether a latent Fourteenth Amendment right lurks somewhere within the environs of the intended action, waiting only to be judicially discovered when the official fails to detect its presence. In the twin cases of *Meachum v. Fano*, 427 U.S. 215 (1976), and *Montayne v. Haynes*, 427 U.S. 236 (1976), involving whether a prisoner had the right to a hearing before being transferred to a less desirable jail, the court indicated he did not have a constitutional right to such, only to one if the state had, through statute or regulation, created such a right. See Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in Federal Courts*, 92 Harv. L. Rev.610, 630 (1979).

56. *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), and *U.S. v. Bekins*, 304 U.S. 27 (1938).

Cooperative federalism involves programs financed largely by the federal government, often on a matching fund basis, and are administered by the states or local governments. There is a sharing of responsibilities, as state (or local) and federal powers are joined in cooperative action where the general welfare of both state and nation may be simultaneously promoted and where both have a common concern. This view, as enunciated by the Supreme Court in *King v. Smith*, 392 U.S. 309,316 (1968), also reasoned that states are not required to participate, but those which desire to take advantage of the substantial federal funds available must conform to statutory requirements and rules and regulations. See Madden, "The Law of Federal Grants," in Advisory Commission on Intergovernmental Relations, *Awakening the Slumbering Giant: Intergovernmental Relations and Federal Grant Law* (Washington, D.C.: U.S. Government Printing Office, 1980), pp. 9-25.

57. The court has held that a state is not required to participate. In *Rosado v. Wyman*, 397 U.S. 397, 405 (1970), the court declared, "[A State] is, of course, in no way prohibited from using only *state* funds according to whatever plan it chooses, providing it violates no provision of the Constitution." (Emphasis original.) Justice Douglas (concurring) remarked in the same case (397 U.S. at 437), "That a State may choose to refuse to comply with the federal requirements at the cost of losing federal funds is, of course, a risk that any welfare plaintiff takes. . . . As long as a State is receiving federal funds, however, it is under a legal requirement to comply with the federal conditions placed on the receipt of those funds; and individuals who are adversely affected by the failure of the state to comply with the federal requirements . . . are entitled to a judicial determination of such a claim."

In *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 422 (1973), the court, determining whether states may independently require individuals to accept employment as a condition for receipt of federally funded aid to families with dependent children, asserted that "[where] the Act allows for complementing state . . . programs and procedures incident thereto,—[s]uch procedures are not necessarily invalid, any more than other supplementary regulations promulgated within the legitimate sphere of state administration."

58. See Schnapper, *Civil Rights Litigation After Monell*, 79 Col. L. Rev. 213,223 (1979). The delegation argument of Schnapper stems from the holding that only acts of those who exercise "official policy" can cause an actionable injury under *Monell*. See quote, note 26 supra. One who acts outside a delegation is presumably, under Schnapper's argument, not exercising official policy. However, as discussed in note 55 supra, the more specificity that is included in guidance given state and local government policy makers, the more that may give rise to lawsuits invoking the Fourteenth Amendment to assure procedural regularity.

59. 42. U.S.C. 2210.

60. William Ernest Henley, "Invictus," *A Concise Treasury of Great Poems*, 379-380.

> "In the fell clutch of circumstance
> I have not winced nor cried aloud.
> Under the bludgeoning of chance
> My head is bloody, but unbowed.
> . . .
> It matters not how strait the gate
> How charged with punishments the scroll.
> I am the master of my fate
> I am the captain of my soul."

Senator DECONCINI. The next witness will be Joseph Curran, representing the National Conference of State Legislatures.

Mr. Curran, we understand you have a statement which we will have printed in the record following your oral presentation. We would like to ask you to consider receiving some questions from us after this hearing today. We do have a number of questions we thought you might be able to help us go through. We will submit them to you.

Please proceed.

STATEMENT OF HON. J. JOSEPH CURRAN, A STATE SENATOR FROM THE STATE OF MARYLAND, REPRESENTING THE NATIONAL CONFERENCE OF STATE LEGISLATURES

Mr. CURRAN. I welcome the opportunity to come from my home city of Baltimore to Washington today to share with you the position of the Law and Justice Committee of the State Federal Assembly, of which I am a member. I believe the statement of our position as formulated in a meeting in Washington, D.C. in April of this year has been distributed.

My name is Joseph Curran. I am a Maryland State senator from Baltimore and presently serve as chairman of the Maryland Senate Judicial Proceedings Committee. I also serve as a member of the Law and Justice Committee of the National Conference of State Legislatures. In that capacity alone am I here to address you this morning.

The National Conference of State Legislatures has not taken a specific position on either S. 584 or S. 585. However, because of the expanded liability of State and local governments, it is of great interest to the National Conference of State Legislatures and, recently, as I indicated, the National Conference State-Federal Assembly and its Law and Justice Committee adopted this resolution, which we respectfully submit for your consideration today.

The National Conference of State Legislatures is concerned about a proliferation of court suits in recent years that has served to promote unwarranted interference in the operations of State government. Judicial expansion of the commerce clause and the spending and taxation powers of Congress, especially, have eroded the sovereignty of State governments. Consequently, the National Conference of State Legislatures commends Senator Hatch for his interest in this problem, particularly since it has been highlighted by the Supreme Court in the *Maine* v. *Thiboutot* decision of June 1980.

That decision, which held that under 42 U.S.C. 1983 State and local governments will be liable for Government action that not only deprives a citizen of constitutional, civil, and equal protection rights, but Government action that violates any Federal law, has been viewed with particular alarm by State and local elected officials. That decision has also held that attorney's fees payable to parties under section 1988, the Civil Rights Attorney's Fee Awards Act of 1976, are recoverable in any section 1983 action. The expanded availability of attorney's fees will deplete the already limited fiscal resources of State and local governments.

Because of this serious situation, the National Conference of State Legislatures supports limiting the scope of section 1983 and section 1988 so that States and their political subdivisions are not so broadly exposed to civil liability. However, sections 1983 and 1988 embody the core of statutory enforcement of civil rights guarantees against the malicious or negligent deprivation of individual liberties by State and local officials. Therefore, it is our position—and we are very much concerned about this—that in no way should these amendments weaken the ability of those sections to enforce the guarantees under the Constitution.

After the *Maine* v. *Thiboutot* decision, State employees may be subject to suits in equity or damages, but they may assert a good-faith defense. States, as entities, may not be sued for monetary damages because of the 11th amendment, but States are subject to orders for prospective relief.

If I may digress for a moment, I would like to give you some idea of how we are concerned about this particular area. In our recent Maryland General Assembly session which just concluded in April of this year we in Maryland took a giant step forward by abrogating the doctrine of sovereign immunity as it impacted on litigants in traditional tort cases against the State.

However, rather than simply abolishing that doctrine entirely and subjecting ourselves to unfathomable numbers of suits and the impact that this might bring on our fiscal resources, we narrowly defined the areas where the suit can be brought and also further defined that only then could there be recovery where there was insurance coverage.

That alone found us in a position of having to expand in the general funds an additional $12 million. I am just trying to give you an area where we went very carefully in abrogating the doctrine of sovereign immunity. We knew what we were doing in narrow, traditional areas, plus we also guaranteed the protection of the injured person by the insurance coverage. That will cost us $12 million a year.

The Civil Rights Attorney's Fee Awards Act does apply directly to the States, thus the States could be required to pay attorney's fees to a prevailing plaintiff in a section 1983 action.

Although States are not in the same precarious position that municipalities are regarding section 1983 liability, the situation is potentially a dangerous one. States may be sued for equitable relief for the violation of any Federal statute. Prospective relief has become a very costly proposition for State governments. An order from a judge to change the system of allocating State revenues, for example, could cost a State millions of dollars. Although this may be appropriate when a citizen's or a group of citizens' rights have been violated, it may not be suitable remedy for the violation of Federal statutes with limited application.

Even if an equitable order in a section 1983 case is not costly to the State, the payment of attorney's fees can be a very expensive proposition. It would be very easy to foresee situations where the payment of attorney's fees may well exceed even the implementation of the relief desired. The payment of attorney's fees may not technically be a "damages award," but it will have the same draining effect on State funds as damage awards.

Again, the payment of attorney's fees may be suitable when citizen's rights have been deprived, but I'm sure that the members of the subcommittee are aware that lawsuits may continue for months, and indeed even years, over the interpretation of relatively minor statutes. It is this prospect that alarms the National Conference of State Legislatures.

Due to the *Maine* v. *Thiboutot* decision, States are essentially under a "double jeopardy" situation, especially in the area of grants administration. On one hand, when a State such as Maryland accepts a grant from the Federal Government, it is faced with the mandates of Congress and the administration through the many complex statutes and regulations that customarily accompany the Federal money. On the other hand, the States are now faced with additional mandates from the judiciary and the prospect of paying millions of dollars to implement systematic relief or to pay attorney's fees.

We think the problem of State liability can best be approached in the following manner: the phrase "and laws" in section 1983 should be amended so that only laws designed to secure rights, privileges, or immunities guaranteed by the Constitution would be enforceable by section 1983. I think the thrust of our position would be that if we could return to a pre-*Maine* position, and then afford to an individual the rights and protections that they have under the Constitution, be it an equal or civil rights proposition or rights that have been denied under any privileges, immunities, or authorities under the Constitution, I think this would be a more comfortable position.

The "equal rights" area has traditionally been limited, as we know, to discrimination based on race, sex, or religion. However, the civil rights secured by the Bill of Rights and the privileges and immunities also secured by the Constitution should also be insured against violation by State and municipal employees.

Additionally, the availability of a good-faith defense by a State's political subdivisions would limit the liability of those entities. Also, individual liberties could be preserved if the good-faith defense were applicable to suits for money damages only.

This might be an approach where you might take a long look at section 1988 and determine whether or not the award for the good-faith defense probably ought to be retained when you are dealing with the availability of a money damage, but I do not know that I would want to permit the good-faith defense when you are simply asking for protective or equitable relief. I think a citizen is entitled to that. This, indeed, may be a strong disincentive for citizens to bring actions for the deprivaton of civil rights if the good-faith defense is available for equitable as well as for monetary actions.

The committee should explore limiting State and municipal liability through amending section 1988. This may be in the area where I think you could do some significant analysis. That section is so broadly written that it is subject to abuse by attorneys.

Currently, there are no provisions regulating when a plaintiff actually prevails or whether fees awarded by the court should be paid on an hourly or contingency basis. Also, the addition of multiplier factors for the unpopularity of a case also greatly increases the attorney fees a State or municipality could pay to a section 1983 plaintiff. There are no provisions regarding attorneys that purposely delay cases or otherwise inflate fees.

The subcommittee may want to consider limiting the award of attorney's fees to section 1983 suits that are brought to restore the rights, privileges, and immunities secured by the Constitution or laws enacted to secure those liberties. The subcommittee also may wish to explore the possibility of eliminating awards to organizations that provide legal services that are partially or completely funded by the United States, a State or its political subdivisions.

There may be additional areas you may wish to explore that will be suggested by other witnesses before this subcommittee. However, I hope our suggestions will encourage additional dialog on this critical situation.

As a brief aside, I am satisfied that in terms of State, city, and local employees, when dealing with an individual citizen's civil or equal rights, there is compliance and seldom abuse. I am satisfied that in those areas we are not going to bear—that is where it was limited to the civil rights and the equal rights protections guaranteed by the Constitution or the civil or equal rights guaranteed by your Federal laws—we are not going to bear in my judgment any fiscal burden that we ought not bear to start out with.

However, when we go beyond that, then we may have some problems. That is why I said earlier in the traditional tort area in the abrogation of the doctrine of sovereign immunity we defined where we were going and we were able fiscally to put a handle on the exposure we had.

Speaking for myself, I do agree with the suggestion of the Law and Justice Subcommittee of going back to a position of pre-*Maine* as a position we probably would feel more comfortable with than a very narrow area, as suggested by S. 585 and 584, although we do applaud the direction, because the open-endedness somewhere down the line is going to cause some real fiscal problems for my city and my State.

If we have questions submitted later, we would be happy to have them analyzed and then get back to you.

Senator DECONCINI. Thank you very much, Senator Curran, for your testimony and your firsthand experience. It is helpful to this committee, I can assure you. We need to be more in touch with State legislators who are on the front line and who are going through this kind of process on a day-to-day basis far more than many of us here.

We may very well have some questions developed by members of the subcommittee and the staff.

Senator DECONCINI. Thank you for being here.

Mr. CURRAN. Thank you so much.

Senator DECONCINI. Our next witness is Althea Simmons. She is the Washington director of the National Association for the Advancement of Colored People.

We are very pleased to have you here.

STATEMENT OF ALTHEA T. L. SIMMONS, DIRECTOR, WASHINGTON BUREAU OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Ms. SIMMONS. Thank you, Mr. Chairman.

I appear here today, Mr. Chairman, on behalf of the more than 1,800 NAACP branches, youth councils, and college chapters across the country.

During the 95th Congress my predecessor in office, Clarence Mitchell, appeared before this subcommittee in support of S. 35, a bill introduced by a Judiciary Committee member, Hon. Charles Mathias. One of the provisions of that bill would have extended coverage of 42 U.S.C. 1983 to municipalities on a limited basis. We supported this because we considered it a significant step forward in the enforcement of civil rights protections. We, of course, would have preferred to go farther and impose full liability under the law on all governmental bodies.

Incidentally, S. 35 would have, among other reforms, extended the proposed liability under the statutes to States and the District of Columbia. Although this does not appear to be a matter of present concern to this subcommittee in these hearings, we wish to go on record as stating that our position would include these entities.

The hearings on S. 35 were conducted on the premise that under the decision of the Supreme Court in *Monroe* v. *Pope*, 365 U.S. 167, 1961, municipalities were outside the definition of "persons" in the statute and thus were totally immune from suit under 42 U.S.C. 1983. However, the court in 1977 overruled the *Monroe* v. *Pope* decision by a 7 to 2 decision in *Monell* v. *New York City Department of Social Services*, 436 U.S. 658, insofar as it conferred an absolute immunity on local governments. It held that local governments could be sued for monetary, injunctive, and declaratory relief where they act unconstitutionally pursuant to an officially adopted policy statement, ordinance, regulation, or decision.

We fear that the hearings today and the intent of the hearings today may be retrogression because blacks increasingly are fearful that history is repeating itself in that gains that were made under civil rights laws are being eroded as they were during the post-reconstruction period. In that period the Supreme Court, Congress, and the States whittled away the protections established by legislation passed by the post-Civil War Congresses.

We believe also that there is a possibility of returning to a society that resembles that particular period. To tamper once again with and dilute a law passed by Congress to enforce the then recently enacted 13th and 14th amendments to the Constitution would confirm our fears that those dark days are returning for those who rely on these amendments to protect their civil rights. We urge this subcommittee not to usher in a new period of reaction.

Just yesterday in testifying on extension of the Voting Rights Act, we again brought this up. During that particular period of time blacks made great progress in civil rights, and then we were stymied for almost 90 years before we were actually able to enjoy the rights that were gained during reconstruction.

We would go beyond S. 35 and urge that a respondent superior liability be imposed on governmental bodies under civil rights statutes. Let me tell you why.

First, we believe that such an extension of the law would confirm what the courts and the Congress have been saying in recent years—that the doctrine of sovereign immunity is an anomaly in a democratic society. All of us recall in civics the concept that the king could do no wrong, a concept this Nation vehemently rejected, at least in theory, in 1776. We feel that the highest government official and the government itself should be held liable for their acts the same as the humblest citizen or his agent.

The second reason is that the hope of damages held out by *Monell* for violations of constitutional rights often is illusory unless they can be collected from the Government. I would like to give you just a personal experience that my organization had in Star City, Ark.

Our lawyers successfully prosecuted a section 1983 action against a law officer who had killed a black father of nine children under circumstances that the courts found as a matter of law violated his right to due process of law. Mr. Russ was arrested in Star City on a minor traffic charge. He was taken to a local courthouse and he never emerged from that courthouse alive. He was killed by a point-blank shot in the head.

After several years of litigation by the NAACP, his widow and his children were awarded $288,000 in damages. That award was worthless, Mr. Chairman, because the official had not only left the jurisdiction, but he was judgment proof. This type of "justice" reduces our judicial system to a farce and undermines the confidence that citizens have in the judicial process.

Mr. Chairman, NAACP would oppose any good faith defense that is accorded to municipalities. A corporation that hires a truck driver who negligently kills someone in an accident, cannot escape liability by saying that the driver had a valid driver's license and that the company instructed him to drive carefully. Neither should a governmental body be able to escape liability, as in the Russ case, by pleading that the law officer failed to follow its policeman's manual in making the arrest.

It is our position that S. 584 and S. 585 would weaken existing law. S. 584 would deny relief to those who are denied rights under Federal laws, except those guaranteeing equal rights. This means that actions could not be brought against government officials who deny welfare benefits, health benefits, social security, rights to the handicapped, and other such benefits to which persons are entitled under Federal laws. They would not be able to be sued.

Since many of these cases are brought by persons of low income, the effect of the law would be disparate on those individuals. Mr. Chairman, 43 percent of all blacks have an income of less than $10,000 per year.

S. 585 would provide political subdivisions with a good faith defense. This would effectively nullify the *Monell* case and would raise the whole issue of "intent/results."

I would suggest, Mr. Chairman, that you might want to have appear before you or send in a statement someone from Howard University School of Law, a noted civil rights law school. I was thinking particularly of Prof. Herbert O. Reid, who is a distinguished professor of law at Howard University Law School.

We also would urge the subcommittee that if you decide to to act to amend 42 U.S.C. 1983, you do so in a way that would increase, not diminish, the protections of constitutional rights of our citizens.

Thank you so much, Mr. Chairman, for allowing us to testify.

Senator DECONCINI. Thank you, Ms. Simmons. We appreciate your testimony.

Let me ask you one particular question of concern to me. Yesterday the subcommittee received some testimony from city attorneys to the effect that local governments were increasingly forced to spend their resources in defending section 1983 suits. Even when they would prevail and win the case, they still had certain budgetary obligations to satisfy.

Inasmuch as local government provides so many services to the public, and with the attitude and atmosphere today on the Hill and in the administration that they are going to be looking more toward local governments to fulfill these services, especially for people who do not have the financial resources to maintain themselves and to assist themselves until they have a base, do you have any concern that section 1983 suits for Federal law not relating to constitutional or civil rights might lessen the ability of cities to provide important services to the poor, particularly as more responsibility is turned over to the cities to provide services to the poor? Has that occurred to you? Has that been a concern?

Ms. SIMMONS. That has occurred to us, Senator. As a matter of fact, we have grave concern with reference to turning so much over to local governments. We have had tremendous experience——

Senator DECONCINI. I know you have.

Ms. SIMMONS [continuing]. With local governments not fulfilling the needs, and also with the kinds of actions taken particularly by police officials against low income persons.

We believe that if, for example, this code is amended, then that will mean that those protections we think we now have will no longer be there. We think it will act to the detriment of the persons whom we serve.

Senator DECONCINI. My point is, first of all, I realize your concern that transfer of administration to the local communities may in fact mean less service to the poor and minorities. However, if that occurs, which it appears to me it will through block grants and this administration's direction, does it concern you that much of these funds and resources could be used—even if used as an excuse, but let us assume on good faith that they are used—for defense purposes rather than delivering these services?

Is it worth considering some alteration here in light of the fact that more duties and obligations are going to be transferred to the local communities?

Ms. SIMMONS. Mr. Chairman, we would opt for insurance that the persons are guaranteed certain basic rights over programs.

Senator DECONCINI. You answered my question. Thank you very much. I have no further questions.

Senator Grassley?

Senator GRASSLEY. I have no questions. It is my understanding Ms. Simmons is the last witness for today.

Senator DECONCINI. That is correct. We had Mr. George Brown scheduled to appear. He is a professor of law at Boston College specializing in intergovernmental relations. Unfortunately, he is seriously ill and could not be with us this morning. I regret that

Professor Brown was unable to be here to give us the benefit of his expertise in person. We certainly wish him well in his recovery.

Senator GRASSLEY. For Chairman Hatch and other members of the committee, I want to thank everybody for participation in this hearing. Those members who were not present may have questions to submit for the record. If any of you receive those questions, we would appreciate responses.

Also, those members who are not here will consider this testimony in determination of their positions on the respective pieces of legislation.

With that, the hearing is adjourned.

Senator DECONCINI. The hearing will stand adjourned, subject to call of the chairman.

[Whereupon, at 10:40 a.m., the subcommittee adjourned, to reconvene at the call of the Chair.]

MUNICIPAL LIABILITY UNDER 42 U.S.C. 1983

WEDNESDAY, JULY 8, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:35 a.m., in room 2228, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senator Grassley.

Staff present: Tom Parry, chief counsel and staff director; Stephen J. Markman, general counsel; Pete Ormsby, professional staff member; and Claire Greif, clerk.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH AND CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. The Subcommittee on the Constitution today continues hearings it began on May 6 and May 7 to consider the current status of municipal liability under 42 U.S.C. 1983.

Section 1983 was originally passed by the 42d Congress as the Civil Rights Act of 1871 and was intended to protect newly freed blacks from deprivation, under the color of State law, of rights secured by the Constitution and laws. For this reason the act was referred to as the Ku Klux Klan Act.

Section 1983 has proven an extremely important civil rights statute. I would once more like to stress my strong commitment to the enforcement of constitutional and civil rights of all individuals.

In some recent interpretations of section 1983, however, the Supreme Court has expanded State and local government liability in ways that have little, if any, relevance to such constitutional or civil rights. Earlier this year, I introduced S. 584 and S. 585 to respond to two of those decisions—*Maine* v. *Thiboutot* and *Owen* v. *City of Independence.*

In *Thiboutot,* the Court determined that section 1983 encompasses claims based on purely statutory violations of Federal law. I remain convinced that the 42d Congress, in passing the Civil Rights Act of 1871, did not intend that municipalities be potentially liable under section 1983 for violation of any and all Federal statutes and that this apparent liability imposed through *Thiboutot* is not justified by important policy considerations.

In *Owen,* the Court decided to deny municipalities a good-faith defense, even when they neither knew nor should have known they were violating anyone's constitutional rights.

I feel that the Court's decision in *Owen* does nothing to deter violations of constitutional rights but does create unnecessary problems for municipal decisionmaking which are likely to result in inertia, delay, and wasted resources.

These decisions combined with the Civil Rights Attorney's Fees Awards Act of 1976, which provides attorney's fees to the prevailing plaintiff in any section 1983 action, have created a tremendous burden on local governments at a time when many of our cities and States are experiencing severe financial difficulties.

Still more recent cases confirm that section 1983 is in a state of flux. For example, only last week the Supreme Court in *City of Newport* v. *Fact Concerts, Inc.*, determined that a municipality is immune from punitive damages under section 1983. The Court came to this conclusion after carefully considering both history and policy—an approach that was noticeably absent in *Thiboutot.*

Also last week, in *Middlesex County Sewerage Authority* v. *National Sea Clammers Association* the Court held that there was no implied right of action under two particular Federal statutes.

Although neither party raised the issue, the Court nevertheless determined that since Congress had included express remedies in both acts it intended that no other remedy be available under section 1983.

In my opinion, these recent decisions, while welcome, do not lessen the need for passage of S. 584 and S. 585, but they do suggest that the Court may be aware of the burdensome liabilities imposed upon municipalities by *Thiboutot* and *Owen.*

Rather than waiting on the courts to straighten things out, the present uncertainty of municipal liability under section 1983 argues strongly for congressional clarification of its intention in passing the Civil Rights Act of 1871.

The majority in *Thiboutot,* after noting Congress silence in the face of its many pronouncements on the scope of section 1983, directed those dissatisfied with its decision to address their concerns to Congress. Indeed, Congress is particularly well equipped to develop a consistent, fair approach to municipal liability under section 1983 which would balance legitimate concerns for individual rights with the ability of State and local governments to serve the public interest generally.

I look forward with great anticipation to the excellent witnesses we will hear from today as the Subcommittee on the Constitution continues to consider municipal liability under section 1983.

Senator Mathias was scheduled to be our first witness. Unfortunately, he will be unable to be with us today. Without objection, we will place Senator Mathias' full statement in the record at this point.

[Material follows:]

STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR.
CONCERNING SENATE BILLS 584, 585, and 990

Mr. Chairman, I welcome the opportunity to share with the Subcommittee on the Constitution my views on the important issue of municipal liability under the Civil Rights Act of 1871 (commonly referred to as section 1983).

I have had a longstanding interest in the liability of governmental entities under section 1983. Three times in the last four years I have introduced the Civil Rights Improvements Act, which addresses the question of section 1983 entity liability and related section 1983 issues as well. The latest version of my bill, S. 990, is pending before this Subcommittee.

Since the Civil Rights Improvement Act was first introduced, as S. 35, in January, 1977, a number of important Supreme Court decisions affecting section 1983 have been handed down. Some concern the liability of governmental units under section 1983; others deal with the proper balance between Federal and State court jurisdiction with respect to the litigation of federally protected rights. Much has changed in four years. Obviously, the entire area of law governing section 1983 is in flux. The time has come for Congress to turn its attention to section 1983 and give much needed stability and clarity to this changing area of law. For this reason, I am pleased that the Subcommittee is holding hearings on this important subject.

To date, the Subcommittee's hearings have dealt primarily with the issues addressed by your own bills, Mr. Chairman, S. 584 and S. 585. These issues -- whether or not governmental entities should be entitled to claim the good faith defense available to their subordinates and whether or not section 1983 causes of action should be based on violations of all federal statutes -- are important ones. They deserve the meticulous review of this Subcommittee. In fact, as I will discuss later, my own bill, S. 990, also deals with the availability of the good faith defense to governmental units. But, despite the significance of these issues, the Subcommittee would be remiss if it were to limit its inquiry basically to these matters. Other issues warrant attention.

Most important, the Subcommittee should consider whether or not Congress should amend section 1983 to set forth the circumstances under which a governmental entity would be liable under section 1983 for the torts of its employees. My bill, S. 990, is designed to provide such statutory guidance. Therefore, I will focus my testimony on the need for Congress to outline the contours of entity liability and why I believe that S. 990 is an appropriate vehicle for such Congressional action. I will also discuss briefly some additional issues addressed by my proposal.

Before turning to a discussion of S. 990, however, I would like to make a few comments about two very recent Supreme Court decisions. In my view, these cases, Middlesex County Sewerage et al v. National Sea Clammers Association, ___ U.S. ___ (June 25, 1981), and City of Newport v. Fact Concerts, Inc., ___ U.S. ___ (June 26, 1981), have a direct and important bearing on the Subcommittee's deliberations. In Fact Concerts, the Court held that municipalities are immune from punitive damages under section 1983. And, in the Sea Clammers case, the Court clarified its earlier decision in Maine v. Thiboutot, 448 U.S. 1 (1981), where it had held that section 1983 causes of actions could be premised on violations of any federal statute. In Sea Clammers, the Court held that plaintiffs could not bring suit under section 1983 if the underlying federal statute alleged to have been violated contained its own comprehensive enforcement scheme. This Subcommittee should ascertain the extent to which these decisions alleviate the legitimate concerns voiced before this Subcommittee by representatives of local governments and, above all, their impact on the need for the section 1983 bills pending before this Subcommittee.

I. Monell and Governmental Liability Under Section 1983. At the time I introduced S. 35, S. 990's predecessor, on January 10, 1977, I noted that one of the major impediments facing plaintiffs under the Civil Rights Act of 1871 was a 1961 Supreme Court decision, Monroe v. Pape, 364 U.S. 167, in which the Court held that cities were not "persons" within the meaning of section 1983 for purposes of monetary relief. Later decisions extended this immunity to counties (Moor v. City of Alameda, 411 U.S. 693 [1972]) and to suits for injunctive relief (City of Kenosha v. Bruno, 412 U.S. 507 [1973]). These decisions were based on the Supreme Court's interpretation of section 1983 and thus subject to Congressional alteration. When I introduced S. 35, I stated that the Court's narrow interpretation of the scope of 1983 had crippled the statute both as a source of deterrence and compensation: it limited the incentive for public entities to take preventive measures against possible misconduct by their officers and employees, and it had the practical effect of precluding recovery against "judgment-proof" public employees, leaving many litigants with a right but not a remedy.

S. 35 was designed to increase the effectiveness of §1983 as a source of compensation and deterrence by removing the absolute immunity conferred on governmental entities and defining the limited circumstances when they should be held liable for the torts of their employees. Significantly, S. 35 would not have imposed financial liability on governments for all such violations, although the adoption of such a "respondeat superior" approach is well within Congress' constitutional authority. Rather, under the bill, governmental liability would have been restricted to situations where there is a reasonable expectation that the fear of monetary damages would lead the entity to adopt preventive measures aimed at deterring future §1983 violations:

> --First, where the conduct was authorized by statute, ordinance, policy, or practice of the entity or was undertaken by those making such policies;
>
> --Second, where a supervisor encouraged or directed his subordinate to engage in the offending conduct;
>
> --Third, where a government employee has a history of misconduct and his supervisor has failed to take the necessary remedial action to prevent its recurrence; and
>
> --Fourth, where a §1983 violation is documented but the identity of the offending officer cannot be determined, such as where a police officer conceals his or her badge.

Shortly after the Senate Judiciary Subcommittee completed its hearings on S. 35 in 1978, the Supreme Court handed down its decision in Monell v. New York City Department of Social Services, 436 U.S. 658 (1978). The cases involved a claim that the New York City Board of Education and Department of Social Services compelled pregnant employees to take unpaid maternity leaves before such leaves were required for medical reasons. This policy was in clear violation of existing Supreme Court precedent. In ruling in favor of the plaintiffs' claim for injunctive relief and back pay for unlawful forced leave, the Court concluded that its prior reading of the legislative history of the Civil Rights Act of 1871 was in error; the Court overruled Monroe v. Pape, "insofar as it holds that local governments are wholly immune from suits under §1983," and held under certain circumstances local governments would be liable for the torts of their employees.

After Monell was decided, I reviewed the Court's opinion, with special attention to its impact on the governmental liability provisions of S. 35. I concluded that the need for the provisions continued after Monell, and, further that Congress must complement the Court's pronouncement by enacting governmental liability provisions along the lines suggested in S. 35. As a result of my review, on November 6, 1979, I introduced a revised version of the Civil Rights Improvements Act which contained governmental entity provisions identical to those in S. 35.

The reasons I reintroduced my bill in the 96th Congress are as valid and compelling today as they were in 1979. Above all, neither in its language in Monell nor in its subsequent decisions has the Supreme Court provided the type of guidance necessary for local governments to predict areas of potential liability and take steps to prevent violations in the future. It is in the best interests of all involved, §1983 plaintiffs and defendants alike, that such guidance be forthcoming. And, I believe the Congress is best equipped to play that role.

In Monell, while the Court did away with the absolute immunity conferred on local governments from §1983 suits, it refused to adopt a "respondeat superior" approach which would have made such governmental units liable for all of the violations of §1983 by its employees. By not doing so, the Court necessarily thrust upon itself and the lower federal courts the task of defining the circumstances when such liability would exist. But, the majority opinion in Monell gives us little guidance in this regard. It merely states that such liability must depend on a "policy statement, ordinance, regulation or decision officially adopted or a governmental custom even though such custom has not received formal approval through the body's offical decision-making channels." Since Monell involved an official policy of the New York City School and Social Services authorities, it was an easy case to decide under this test. Not all cases, however, are as clear cut as Monell.

It might require years of litigation for the federal courts to delineate the contours of governmental liability under §1983. By enacting the Civil Rights Improvements Act with its clear specifications of governmental liability, Congress could shorten this process. Significantly, the standards of liability contained in the bill are not foreign to §1983 litigation. By and large, they reflect the case law that has developed in the lower courts in suits against supervisory officials, where plaintiffs have sought to hold them liable for the torts of their subordinates. Thus federal judges will have a wealth of related precedent to rely upon when confronted with suits brought under the governmental liability provisions of the Civil Rights Improvements Act. In addition, Congress -- unlike a court of law -- can supplement its own standards governing entity liability under §1983 with a detailed legislative history replete with examples of actions that would and would not result in the imposition of such liability.

Since local governments now have little guidance after Monell as to when they will face §1983 liability, they are hampered in their efforts to develop effective risk management programs aimed at deterring future §1983 violations. Enactment of my bill would have the salutary effect of giving governmental units much greater notice of potential liability than they now have. This would enable the units to develop and modify their preventive programs accordingly.

Another key factor prompting the reintroduction of the entity liability provisions of my bill is the need to put an end to the immunity of states from §1983 liability and thus insure that state and local governments are treated equally under the statute.

Until recently, the Eleventh Amendment's grant of sovereign immunity was thought to be a bar against the awarding of money damages against States and state officials acting in their official capacity. But, in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) the Supreme Court paved the way for such suits. In Fitzpatrick, the Court held that the Eleventh Amendment and the doctrine of State sovereign immunity were limited by the enforcement provision of

Section 5 of the Fourteenth Amendment and thus recognized that Congress could authorize retroactive monetary damage awards against States.

Prior to Fitzpatrick and Monell, state liability under §1983 was denied routinely. In fact, in Edelman v. Jordan, 415 U.S. 651 (1974), the Court seemed to indicate that the Eleventh Amendment was a bar to monetary damage awards under §1983. But, after Monell was decided, the argument was made that Monell's reinterpretation of the legislative history of §1983 undermined Edelman and that §1983 money damage suits were permissible against States. Regrettably, in Quern v. Jordan, 440 U.S. 332(1979), the Court rejected this argument and reaffirmed its holding in Edelman that Congress, in enacting §1983, did not intend to abrogate the Eleventh Amendment immunity of the States. Thus after Quern, we are left with the anomalous situation in which States are fully immune from §1983 suits, but local governments are not. There is no public policy justifying this dichotomy. It is a result of the Court's reading of the legislative history of §1983. Thus it can be offset by Congress and it should be. The Civil Rights Improvements Act would do just that.

Another argument in favor of my bill is the need for Congress to codify the Supreme Court's recent decision, Owen v. City of Independence, 445 U.S. 622 (1980). In Owen, the Court ruled that municipalities have no immunity from §1983 suits and thus precluded the City of Independence, Missouri from invoking the good faith defense of its representatives.

Section 2 (D) (1) of the Civil Rights Improvements Act addresses this issue. The proposal would not alter the ability of an individual defendant to utilize any of the existing immunities and defenses, but it would provide that governmental bodies would not be entitled to claim such individual defenses and immunities. Thus §1983 plaintiffs who are met with a successful claim of immunity by an individual will nonetheless be able to proceed directly against the governmental entity.

For example, where a police officer enforces an unconstitutional statute in the good faith belief that it is constitutional, it is both fair and sound public policy to relieve him of liability under §1983; but it would be inappropriate to shield the governmental entity from liability. The entity itself has abused its powers in an unconstitutional way; it is more equitable that the costs associated with the entity's unconstitutional actions be borne by society as a whole rather than absorbed entirely by the victim of the official misconduct. As Justice Brennan wrote in Owen:

> A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. Yet owing to the qualified immunity enjoyed by most government officials, many victims of municipal malfeasance would be left remediless if the city were allowed to assert a good faith defense.

II. Limiting Access to Federal Courts. Since Monell was handed down in May, 1978, much of the discussion about §1983 has focused on the scope of governmental liability under the statute. This is certainly understandable. For the first time local governments face the possibility of money damage liability. For the first time local governments have a financial incentive to take precautionary measures to prevent future §1983 violations.

But the escalating debate over entity liability under §1983 must not obscure the fact that over the past decade the Supreme Court has rendered a number of decisions significantly curtailing access to the federal courts for those seeking relief under §1983. Typical of this trend is the Court's expansion of the judicially-created doctrine of Younger v. Harris, 401 U.S. 37 (1971), regarding federal intervention in state court proceedings.

In Younger, the Court set out the limited circumstances under which a Federal court could enjoin a pending State criminal proceeding--in effect, only where the State or local officials are prosecuting a defendant in bad faith. Although Younger dealt solely with a pending State criminal proceeding, the Court has applied Younger to certain civil matters,(see e.g., Huffman v. Pursue Ltd., 420 U.S. 593 (1975); Trainor v. Hernandez, 431 U.S. 434 (1977); Judice v. Vail, 430 U.S. 327 (1977) and Moore v. Sims, 442 U.S. 415(1979))and Justice Brennan at least believes the majority has already decided to bring all civil proceedings within Younger and "merely the formal announcement is being postponed." Moreover, in Rizzo v. Goode, 423 U.S. 362 (1976), there is an indication that not only may Younger be extended to civil proceedings, but that injunctions against state and local administrative proceedings may also fall within the doctrine. Finally, the Court has applied the Younger rationale even to instances where a Federal court proceeding has actually commenced prior to the filing of a state action (Hicks v. Miranda, 422 U.S. 332(1975)). This is a particularly troublesome ruling -- one which State prosecutors could use to file a local suit to oust the Federal courts of jurisdiction.

The full impact of the Younger doctrine on §1983 cannot be appreciated unless it is viewed in tandem with the Court's recent decision in Allen v. McCurry, 101 S.Ct. 411(1980). In Allen, the Court ruled that the doctrines of res judicata and collateral estoppel were generally applicable to §1983 cases. Allen thus bars relitigation of matters raised in an earlier state proceeding, even where the §1983 plaintiff was a criminal defendant and thus an unwilling participant in the earlier proceeding. For example, assume a student participating in a peaceful demonstration is arrested and prosecuted under a very vague local ordinance of dubious constitutionality. At his trial, the student argues that the ordinance is unconstitutional. He is subsequently convicted. He then brings §1983 suit seeking money damages and to have his criminal record expunged. Under Allen, it appears that his suit would be barred.

Under the Younger doctrine, §1983 plaintiffs are often compelled to defer federal court consideration of their constitutional and statutory claims until after related state proceedings are concluded. But, in view of Allen, it appears that such deferrals might well deprive many §1983 plaintiffs of a federal trial forum, thus largely negating the original intent of the authors of §1983 who meant the Civil Rights Act of 1871 to establish the federal government and the federal courts as the primary protectors of our federal rights.

The Civil Rights Improvements Act would preclude the extension of the Younger rationale to civil proceedings, limit it to criminal cases and set forth clear guidelines governing the application of the traditional principles of preclusion to §1983 cases. In effect, the bill would establish statutory standards designed to strike an appropriate balance between the traditional and legitimate state interest in conducting its own court proceedings without fear of undue federal intervention and the longstanding Congressional policy that an individual be provided a federal forum to litigate his §1983 claim.

CONCLUSION

Mr. Chairman, S. 990 is an effort to provide a comprehensive and workable framework for individual and governmental liability under section 1983 -- a framework that insures broad and effective protections for victims of official misconduct without impinging upon the legitimate interests of individual and institutional section 1983 defendants. I urge the Subcommittee to give full consideration to my bill, especially its governmental entity provisions.

Senator HATCH. I would also like to take this opportunity to praise Senator Mathias for his interest and expertise in section 1983. Senator Mathias first introduced a bill to amend section 1983 in the 95th Congress when municipal liability was quite a different situation than we find today.

At that time, municipalities were completely immune under section 1983, and the balance between individual rights and the ability of local governments to serve the people was tipped in the opposite direction from where we find it today.

Senator Mathias has introduced S. 990 in this Congress. S. 990 is important legislation on section 1983. I am particularly interested in the provisions of the bill which would create uniform standards whereby municipalities would be liable for section 1983 violations.

I do have some concerns about certain provisions of the bill, but I plan to continue to consider S. 990 carefully in these hearings.

I also regret to announce that Prof. Robert Freilich will be unable to testify today. Professor Freilich's mother is seriously ill, and he is in Florida with her.

I certainly understand his desire to be with his mother at this time, and, of course, I hope she recovers quickly.

Professor Freilich is the editor of the Urban Lawyer and has a great deal of experience with local governments, and we will miss not having him here to personally deliver his testimony. Perhaps we can get that in writing.

Our first witnesses will testify in behalf of the National Association of Counties. Counties are one of the local government units that are directly affected by the current liability under section 1983.

The National Association of Counties will be represented by Mr. Scott Fosler, council member of Montgomery County, Md., and Mr. George Cross, corporation counsel of Wayne County, Mich. They are accompanied by Mr. Geoffrey Trego, legislative representative for the National Association of Counties.

We will be happy to take your testimony at this time, gentlemen.

STATEMENT OF SCOTT FOSLER, COUNCIL MEMBER, MONTGOMERY COUNTY, MD., ACCOMPANIED BY GEORGE CROSS, CORPORATION COUNSEL, WAYNE COUNTY, MICH.; AND GEOFFREY TREGO, LEGISLATIVE REPRESENTATIVE, NATIONAL ASSOCIATION OF COUNTIES

Mr. FOSLER. Mr. Chairman, my name is Scott Fosler, council member of Montgomery County, Md., and representative of the Home Rule-Regional Affairs Steering Committee which has policy jurisdiction for the National Association of Counties on this issue.

I am accompanied, on my right, by Mr. George Cross, the corporation counsel of Wayne County, Mich., and vice president of the National Association of County Civil Attorneys; and, on my left, Mr. Geoffrey Trego, legislative representative for the National Association of Counties.

Mr. Chairman, we would like to thank you for taking the initiative and providing the leadership on the issue of public liability by introducing S. 584 and S. 585 and by holding these hearings.

Rather than read the entire statement, Mr. Cross and I would like to summarize NACo's testimony and then answer any questions the subcommittee may have. We respectfully request that our entire written statement be included for the record.

Senator HATCH. Without objection, that will be done.

Mr. FOSLER. The National Association of Counties is and has been firmly supportive and active in protecting individual and collective civil rights throughout our Nation's counties. We do not wish to in any way diminish or threaten the ability of individuals to pursue their legitimate civil rights.

The issues under discussion today are limited. We are not discussing liability for monetary damages as established by the *Monell* decision in cases of legitimate civil rights grievances. We are not challenging individual and class actions to obtain injunctive or declaratory relief under the law.

Instead, the issues in question today can be summarized as follows: First, should every Federal law be given the same preferred status as fundamental civil rights protections? Second, should good faith be eliminated as a consideration in evaluating public officials' actions?

Recent court decisions suggest that both questions be answered yes. We believe, however, that the *Owen* and *Thiboutot* decisions have seriously and unfairly moved the delicate balance off center between individual civil rights and ability of Government to function on behalf of its citizens.

Mr. Chairman, we strongly support the thrust of your two bills, S. 584 and S. 585, which will go a long way to restoring the balance needed in this complex and delicate area. The objective must be both to insure legitimate civil rights and to enable governments to function.

We fully endorse and encourage Congress to assume its legitimate and necessary role in clarifying a statute which was passed 110 years ago for much narrower and different purposes than those for which it is being used today.

We believe some of the recent Supreme Court decisions have unwisely changed public policy and contributed to overdependence on litigation to remedy any and all grievances in the name of civil rights. These decisions have already begun to inhibit the necessary functions, programs, and services which governments perform.

Mr. Chairman, we applaud and endorse your effort to restore the good faith defense of local governments. Elected and appointed officials have always been presumed to be acting in good faith. The governments they represent should be provided similar legal status. After all, governments can only act through their elected and appointed officials.

We also agree with your proposal to limit the scope of section 1983 cases to legitimate civil rights issues. It does not serve the purpose of legitimate civil rights claimants, governments, or the taxpayers for State and local governments to be fully liable for all Federal statutes.

That is a summary of the NACo testimony, and I would like to ask Mr. George Cross if he would continue.

Mr. CROSS. Mr. Chairman, speaking on behalf of the National Association of Counties, we thank you for the opportunity to speak in support of S. 584 and S. 585.

I will not rehash the history of the Civil Rights Act nor recite the cases under the act which have broadened the scope of inquiry and liability beyond that intended by the 1871 Congress and have also narrowed the defenses available to local units of government. These cases have been thoroughly reviewed, I believe, in previous presentations and probably will be reviewed again in subsequent presentations.

I appear here not only as the spokesman for the National Association of County Civil Attorneys as their vice president but also as an advocate describing the dilemma of my local unit of government—Wayne County, Mich.—and other units similarly situated.

I have also not misplaced my responsibility as an officer of the court dedicated to defend the rights of citizens whose collective majority vote is, in fact, government at the roots level.

The saying goes that hope springs eternal, and the June 26, 1981, decision of the Supreme Court in the *Facts Concerts* case denying punitive damages against the municipality involved is a glimmer of hope, but, as a lawyer, I am reluctant to admit that my confidence is better placed in the Congress of the United States than in the U.S. Supreme Court in this area of law.

After all, Congress created the Civil Rights Act, and Congress should establish its parameters in language which leaves little room for interpretation.

Since the U.S. Government and sovereign States are immune from liability unless they waive it, under the law it is only logical and fair that the law be phrased in language which nonlegally-trained county commissioners can understand and know of their legal responsibility under it.

Mr. Chairman, we believe that your two bills go a long way to achieving that understanding and defining the responsibility, and we wholeheartedly support your leadership in this matter.

Currently—speaking from personal knowledge—in Wayne County, we have some $10.5 million in damage demands under 1983 in only 10 cases—an average of more than $1 million per case. This does not include punitive damage requests or attorney's fees.

These cases run the gamut from disciplining of a deputy sheriff to a claim by an employee of failure to be promoted when actually his lawsuit arises out of a conflict between the collective bargaining agreement and the civil services rules and regulation of Wayne County.

Wayne County is the rule and not the exception in these kinds of cases. We have no wish to eliminate suits to enforce civil rights. Complete immunity for government would be as disastrous to aggrieved Americans as the current unlimited liability is to governments and taxpayers who must pay the bill.

Mr. Chairman, the bill is paid with service dollars. Do we pick up garbage and provide health and welfare and policy services, or do we pay for civil rights violations? More important, in either case, under the current state of the law, how do we determine how to budget for these obligations?

As head of the legal department of Wayne County, it falls upon me to decide not only how to defend but if we should defend. Jury verdicts, particularly with government as a target defendant, have gotten out of hand.

In many instances, my office along with other county counsel in other parts of the country will settle a case even though we are honestly satisfied that our client is innocent of any wrongdoing solely because the cost of defense paid in settlement is cheaper than gambling a jury verdict of greater proportion.

The lawyers representing litigants bringing these suits are fully aware that even a specious case is worth something in settlement value from a bewildered local government.

These two bills are a giant step toward balancing the equities. Complainants will know under what facts a suit can be brought, and government will know and hopefully take steps to prevent a liability from occurring. Now, both can only guess, except the claimant's guess is more assured of success currently under the law.

We believe that you, as representative of the American people. and your colleagues have the responsibility in this matter.

Judges are appointed and not anointed. Why leave them to guess your purpose and intention in interpreting the laws which you create? I suggest that you tell the courts in no uncertain terms what you mean by setting the language of the law in clear and concise terms. You will not only serve the litigants in these kind of cases by doing so, but you will probably reduce Federal caseloads substantially.

S. 584 and S. 585, with all due respect to you, Mr. Chairman, are not a panacea and will not cure all the inequities currently existing. The full range of civil rights statutes should be reviewed, but certainly your bills are a great step forward toward achieving that balance.

I point out attorney's fees as an example. As an attorney, I am a great believer in lawyers getting paid for their services, but I wonder if you and your colleagues are aware that under judicial discretion lawyers have received interest on their fees by court order. Also are your colleagues and you aware that federally-funded and/or State-funded legal service organizations can also receive attorney's fees, which is really a double dip into the already empty taxpayer's pocket?

NACo does not support any diminution of a citizen's right to obtain injunctive or declaratory relief or even damages for actual losses sustained, but NACo does believe that the scale of justice is out of balance in this area of the law.

A felon is presumed innocent until proven guilty. In the area of civil rights, accusation is in many instances equal to guilt in the eyes of many citizens, and now that good faith is no longer a defense for the local unit of government the accused felon has more rights that government.

Mary Coleman, the chief justice of the Michigan Supreme Court, has said: "The law must be fair," and we believe that S. 584 and S. 585 go a long way in achieving that fairness.

Thank you, Mr. Chairman, for the opportunity to present our view in support of S. 584 and S. 585.

Senator HATCH. Let me just ask this question: What changes would you recommend that we add to the two bills that I have filed, or what changes in the Civil Rights Act would you add?

Mr. CROSS. In S. 584—and while I am really not prepared to give you exact language—I think the language that you suggest changing from the words, "and laws" to "equal rights," should be elaborated upon and defined more clearly.

Equal rights can run a large gamut also, and while we are not now prepared to give you or suggest to you exact language, we will certainly be happy to provide some help in that area if, in fact, it is your wish to have us submit some.

Senator HATCH. I would like you to submit whatever suggestions you care to.

What effect is the apparent decision in *Thiboutot* likely to have on the manner in which counties carry out Federal programs, and how is that decision likely to affect the allocation of resources in countries?

Mr. FOSLER. The recent Supreme Court decisions are fairly new, and I would say probably the most marked consequence for local government officials that I am familiar with—and certainly those that I serve with—is one of confusion.

It is not altogether clear to them what effect the recent decisions have in practice. In fact, there has been confusion as to the extent to which the decisions apply to government in general and the extent to which they apply to individual officeholders in particular.

There has been increasing talk about the importance of personal liability insurance and taking actions of a personal nature to insure against that kind of liability. To some extent, that results from confusion as to what the Supreme Court decisions really decide.

There has also been a general sense of uncertainty as to how this affects the way in which decisions ought to be made. There are a couple of instances of particularly complicated questions that involve our county in major decisions of policy.

It raises a great degree of uncertainty as to what kind of responsibility the government has and how far need we go in looking at what the immediate and the secondary and the tertiary consequences of actions will be.

I would say that it has had a tendency to make the thinking somewhat more cautious, which is not in and of itself necessarily bad. I think it depends on what effect that has on the decisions that are made on a range of issues.

So while it is too soon to say for sure what effect the combination of decisions will have, I would say that at this point it is one of confusion, it is one of uncertainty, and it is one of additional caution.

Senator HATCH. Apparently local government units such as counties do not enjoy a good faith defense. How has this and how will this affect the decisionmaking processes of counties, and how will it affect your ability to serve the public in these areas?

Mr. FOSLER. I think for the same reasons as I indicated there is that much more confusion and uncertainty as to what kind of effect these decisions will have in terms of establishing actions that will result in litigation.

In virtually all of the actions that we take at the present time that involve major land use decisions—for example, locating a landfill or a solid waste composting site or the like—we typically build in as much as 18 months to 2 or 3 years for litigation pursuits of one kind or another, which has set the time schedule back considerably in attempting to meet some of these community needs.

I would say the effect of these decisions would be for us in our immediate planning to lengthen that period of time for one thing.

Senator HATCH. If S. 585 were to pass, some individuals may have their rights violated and be left without a remedy, especially in the limited case where the local government neither knew nor should have known it was violating anybody's constitutional rights.

Do you feel that this result is justified in light of the burden placed upon local governments forced to function without a good faith defense?

Mr. FOSLER. I think that is a reason for legitimate concern, and it is something that I thought about a great deal, and I think it is something that all local government officials are very much concerned about.

I think you will find most local government officials—as is the case with most elected officials—get involved in public office in the first place because they are extremely concerned about individual rights.

I think the consideration here is: Which way has the balance been shifting, and what effect is that going to have on the collective interests of the community?

Our concern has been that, with the series of Supreme Court decisions, the balance has been shifting too far in one direction and undermining, not only the ability of the Government to function in an effective manner for the collective good, but I sense as well the potential that it could also undermine legitimate claims of civil rights violation.

Senator HATCH. The Civil Rights Attorneys Fees Awards Act of 1976 was to provide poor people with the ability to obtain competent counsel to enforce their civil rights. In furthering this goal, has the development of section 1988 provided incentives or to bring frivolous or, should I say, questionable suits, and what effect has this had on counties?

Mr. FOSLER. Let me ask Mr. Cross if he could address that.

Mr. CROSS. Mr. Chairman, certainly all cases brought under the Civil Rights Act are not frivolous, and we do not suggest that, but the assurance of attorney's fees and the discretion with which they are awarded, and the spectrum of the dollars awarded have caused unintended results. I have here before me the United States Code, Annotated, and last night I was looking through it to get some idea of the problem. It runs anywhere from a judge appropriating $30 per hour for legal services to $100 per hour, and in one instance the judge said: "Well, there are a great number of people involved in this matter, and I am going to award you $272,000." I think that is a great incentive for lawyers to bring lawsuits even though their lawsuit may be very peripheral and very thin.

Senator HATCH. It is a great incentive for them to fabricate lawsuits as well.

Mr. CROSS. Well, I would not——

Senator HATCH. You would not think lawyers would do that, though?

Mr. CROSS. Sir, I have practiced law for 30 years. I would hope that my profession had more integrity than that.

Senator HATCH. But at least you would have to say that some find lawsuits on the most slender issues of evidence.

Mr. CROSS. Yes, sir, in fact the imagination of lawyers is infinite.

Senator HATCH. I think that is a very diplomatic way of answering my question.

Mr. CROSS. Thank you, sir. [Laughter.]

Senator HATCH. Let me just ask you one other question. Do you have any recommendation which would ease the burden created under section 1988?

Mr. CROSS. I have a suggestion. I think maybe the attorney's fees ought to be standardized. I do not mean necessarily in dollars but in its approach to whether or not they should be awarded in some uniform fashion.

I do not know how you would do that through the length and breadth of this country, but I think some effort in that direction ought to be made.

Unfortunately it happens to be true to my knowledge that lawyers are very friendly with judges [there are lawyers who do nothing but this kind of work, necessarily appearing before courts more frequently than others] those lawyers have a tendency to receive greater fees than do lawyers who seldom appear before those Federal judges.

We have discovered that there are certain lawyers in our community who, when appearing before a Federal judge in a case like this, will end up with $100 an hour because that appears to be their standard charge. Another lawyer, not as well known to the judge, who may be a little bit younger or inexperienced, will only receive $40 an hour. I think that is unfair. I think it is what the lawyer did and the success of the lawsuit that should determine the fee.

Senator HATCH. I would like you to put in writing for us your best recommendation of language that might help to resolve that difficulty because I can see where municipalities are getting hammered pretty hard by the discretion allowed to the judges in these cases. If you have some additional language, we would love to see it.

Mr. CROSS. I am not prepared for that right now, Mr. Chairman, but I will submit something at a later date.

Senator HATCH. That would be wonderful.

We appreciate you gentlemen being with us today and for the feelings you have as you have expressed them here today.

Mr. CROSS. Thank you very much.

Senator HATCH. Thank you for coming.

Mr. FOSLER. Thank you, Mr. Chairman.

Senator HATCH. Without objection, your prepared text will be included in the record at this point.

[Material follows:]

PREPARED STATEMENT OF SCOTT FOSLER AND GEORGE CROSS

MR. CHAIRMAN, MY NAME IS SCOTT FOSLER, COUNCILMEMBER OF MONTGOMERY COUNTY, MARYLAND, AND REPRESENTATIVE OF THE HOME RULE-REGIONAL AFFAIRS STEERING COMMITTEE WHICH HAS POLICY JURISDICTION FOR THE NATIONAL ASSOCIATION OF COUNTIES (NACo)* ON THIS ISSUE. I AM ACCOMPANIED BY MR. GEORGE CROSS, CORPORATION COUNSEL OF WAYNE COUNTY, MICHIGAN, AND VICE PRESIDENT OF THE NATIONAL ASSOCIATION OF COUNTY CIVIL ATTORNEYS, AND MR. GEOFFREY TREGO, LEGISLATIVE REPRESENTATIVE FOR THE NATIONAL ASSOCIATION OF COUNTIES.

MR. CHAIRMAN, WE WOULD LIKE TO THANK YOU FOR TAKING THE INITIATIVE AND PROVIDING THE LEADERSHIP ON THE ISSUE OF PUBLIC LIABILITY BY INTRODUCING S. 584 AND S. 585 AND BY HOLDING THESE HEARINGS. RATHER THAN READ THE ENTIRE STATEMENT, MR. CROSS AND I WOULD LIKE TO SUMMARIZE NACo'S TESTIMONY AND THEN ANSWER ANY QUESTIONS THE COMMITTEE MAY HAVE. WE RESPECTFULLY REQUEST THAT OUR ENTIRE WRITTEN STATEMENT BE INCLUDED FOR THE RECORD.

SUMMARY

THE NATIONAL ASSOCIATION OF COUNTIES IS AND HAS BEEN FIRMLY SUPPORTIVE AND ACTIVE IN PROTECTING INDIVIDUAL AND COLLECTIVE CIVIL RIGHTS THROUGHOUT OUR NATION'S COUNTIES. WE DO NOT WISH TO IN ANY WAY DIMINISH OR THREATEN THE ABILITY OF INDIVIDUALS TO PURSUE THEIR LEGITIMATE CIVIL RIGHTS. THE ISSUES UNDER DISCUSSION TODAY ARE LIMITED. WE ARE NOT DISCUSSING LIABILITY FOR MONETARY DAMAGES AS ESTABLISHED BY THE MONELL DECISION IN CASES OF LEGITIMATE CIVIL RIGHTS GRIEVANCES. WE ARE NOT CHALLENGING INDIVIDUAL AND CLASS ACTIONS TO OBTAIN INJUNCTIVE OR DECLARATORY RELIEF UNDER THE LAW. INSTEAD, THE ISSUES IN QUESTION TODAY CAN BE SUMMARIZED AS FOLLOWS:

1. SHOULD EVERY FEDERAL LAW BE GIVEN THE SAME PREFERRED STATUS AS FUNDAMENTAL CIVIL RIGHTS PROTECTIONS?
2. SHOULD "GOOD FAITH" BE ELIMINATED AS A CONSIDERATION IN EVALUATING PUBLIC OFFICIALS' ACTIONS?

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* The National Association of Counties is the only national organization representing county government in the United States. Through its membership, urban, suburban and rural counties join together to build effective, responsive county government.

The goals of the organization are to:
- improve county government;
- serve as the national spokesman for county government;
- act as a liaison between the nation's counties and other levels of government;
- achieve public understanding of the role of counties in the federal system.

RECENT COURT DECISIONS SUGGEST THAT BOTH QUESTIONS BE ANSWERED, "YES." WE BELIEVE, HOWEVER, THAT THE OWEN AND THIBOUTOT DECISIONS HAVE SERIOUSLY AND UNFAIRLY MOVED THE DELICATE BALANCE OFF CENTER BETWEEN INDIVIDUAL CIVIL RIGHTS AND ABILITY OF GOVERNMENT TO FUNCTION ON BEHALF OF ITS CITIZENS.

MR. CHAIRMAN, WE STRONGLY SUPPORT THE THRUST OF YOUR TWO BILLS, S. 584 AND S. 585, WHICH WILL GO A LONG WAY TO RESTORING THE BALANCE NEEDED IN THIS COMPLEX AND DELICATE AREA. THE OBJECTIVE MUST BE BOTH TO INSURE LEGITIMATE CIVIL RIGHTS AND TO ENABLE GOVERNMENTS TO FUNCTION.

WE FULLY ENDORSE AND ENCOURAGE CONGRESS TO ASSUME ITS LEGITIMATE AND NECESSARY ROLE IN CLARIFYING A STATUTE WHICH WAS PASSED 110 YEARS AGO FOR MUCH NARROWER AND DIFFERENT PURPOSES THAN THOSE FOR WHICH IT IS BEING USED TODAY. WE BELIEVE SOME OF THE RECENT SUPREME COURT DECISIONS HAVE UNWISELY CHANGED PUBLIC POLICY AND CONTRIBUTED TO OVERDEPENDENCE ON LITIGATION TO REMEDY ANY AND ALL GRIEVANCES IN THE NAME OF CIVIL RIGHTS. THESE DECISIONS HAVE ALREADY BEGUN TO INHIBIT THE NECESSARY FUNCTIONS, PROGRAMS AND SERVICES WHICH GOVERNMENTS PERFORM.

MR. CHAIRMAN, WE APPLAUD AND ENDORSE YOUR EFFORT TO RESTORE THE "GOOD FAITH" DEFENSE OF LOCAL GOVERNMENTS. ELECTED AND APPOINTED OFFICIALS HAVE ALWAYS BEEN PRESUMED TO BE ACTING IN GOOD FAITH. THE GOVERNMENTS THEY REPRESENT SHOULD BE PROVIDED SIMILAR LEGAL STATUS. AFTER ALL, GOVERNMENTS CAN ONLY ACT THROUGH THEIR ELECTED AND APPOINTED OFFICIALS. WE ALSO AGREE WITH YOUR PROPOSAL TO LIMIT THE SCOPE OF SECTION 1983 CASES TO LEGITIMATE CIVIL RIGHTS ISSUES. IT DOES NOT SERVE THE PURPOSE OF LEGITIMATE CIVIL RIGHTS CLAIMANTS, GOVERNMENTS OR THE TAXPAYERS FOR STATE AND LOCAL GOVERNMENTS TO BE FULLY LIABLE FOR ALL FEDERAL STATUTES.

THE PROBLEM

IT IS NOT AN EXAGGERATION TO SAY THAT THERE HAS BEEN AN EXPLOSION OF SEC. 1983 CASES INVOLVING COUNTY GOVERNMENTS IN THE LAST FEW YEARS. WE DO NOT KEEP TRACK OF SUCH STATISTICS BUT THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS (NIMLO) HAS SUPPLIED THE COMMITTEE WITH SURVEY INFORMATION WHICH BEGINS TO DESCRIBE THE SEVERITY OF THE PROBLEM. THE SURVEY OF 215 CITIES AND COUNTIES RESPONDING REPORTS ALMOST $5 BILLION DOLLARS OF DAMAGES SOUGHT IN CIVIL RIGHTS CLAIMS ALONE. WE WOULD NOT PRESUME TO EXTRAPOLATE FROM THESE FIGURES TO THE OVER 39,000 UNITS OF STATE AND LOCAL GOVERNMENT, BUT IT IS

FAIR TO SAY THAT THE POTENTIAL LIABILITY IS ENORMOUS AND THE SITUATION HAS REACHED THE CRISIS STAGE. IN MONTGOMERY COUNTY WE PRESENTLY HAVE ABOUT FIFTEEN PURE SECTION 1983 SUITS PENDING AGAINST THE COUNTY AND ITS OFFICERS WITH CLAIMED DAMAGES TOTALING APPROXIMATELY $20 MILLION. THE COURTS HAVE DETERMINED THAT IN NONE OF THESE CASES HAS THE COUNTY BEEN GUILTY OF ANY WRONGDOING. IN ADDITION WE HAVE A LAND USE CASE PENDING WHICH HAS SOME CIVIL RIGHTS IMPLICATIONS WITH POTENTIAL DAMAGES OF ANOTHER $20 MILLION. FORTUNATELY, IN MONTGOMERY COUNTY WE HAVE SUFFICIENT AND CAPABLE LEGAL STAFF. UNFORTUNATELY, MOST OF THE NATION'S 3,104 COUNTIES ARE NOT SO WELL EQUIPPED TO HANDLE THESE CASES.

MOST COUNTIES ARE RURAL (2,456) WITH PART-TIME ELECTED OFFICIALS AND WITHOUT A COUNTY ADMINISTRATOR (2,402).* MOST COUNTIES HAVE ONLY A PART-TIME COUNTY COUNSEL WITH NO FULL-TIME LEGAL STAFF. IN SHORT, THE CAPABILITY TO ADEQUATELY DEFEND AGAINST SEC. 1983 SUITS AMONG COUNTY GOVERNMENTS HAS NOT KEPT PACE WITH THE GREATLY EXPANDED LIABILITY. THIS HAS PUT MANY COUNTY GOVERNMENTS IN A VERY DIFFICULT POSITION. IN ADDITION, COUNTY BUDGETS HAVE BECOME INCREASINGLY TIGHT - THERE IS OFTEN NEITHER THE RESOURCES AVAILABLE TO EXPAND LEGAL STAFFS NOR THE LUXURY OF TAKING THE CHANCE OF LOSING IN COURT. DAMAGES AND ATTORNEYS' FEES COULD BE IN EXCESS OF A COUNTY'S ANNUAL BUDGET. THESE FACTORS OFTEN LEAD TO OUT OF COURT SETTLEMENTS EVEN WHEN THE COUNTY BELIEVES IT HAS DONE NO WRONG AND HAS A GOOD CASE TO DEFEND. THE RISK OF LOSING A JURY TRIAL, WHERE THE OUTCOME IS UNCERTAIN AND THE SYMPATHIES OF THE JURY ARE OFTEN WITH THE PLAINTIFF, IS SIMPLY TOO GREAT TO BEAR. THIS CREATES A VICIOUS CYCLE. EVEN FRIVOLOUS LAWSUITS ARE ENCOURAGED BECAUSE THE POTENTIAL PLAINTIFF AND ATTORNEY KNOW THEY STAND A GOOD CHANCE TO GET AN EASY SETTLEMENT FROM THE COUNTY OR CITY. WE DOUBT THAT CONGRESS INTENDED OR FORESAW THESE EFFECTS WHEN THEY PASSED THE CIVIL RIGHTS ACT OF 1871. WE WOULD HOPE THAT THIS CONGRESS WOULD NOT ALLOW THIS SITUATION TO CONTINUE AND WORSEN.

THE COMBINED EFFECT OF THE MONELL, OWEN AND THIBOUTOT SUPREME COURT DECISIONS HAS BEEN TO PUT LOCAL ELECTED OFFICIALS IN A LEGAL STRAIGHTJACKET, CIRCUMSCRIBING THEIR ABILITY TO LEAD, GOVERN AND MAKE THE DIFFICULT

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* The County Year Book, 1978

DECISIONS THAT THEY WERE ELECTED TO MAKE. THESE COURT CASES HAVE INCREMENTALLY OPENED THE DOOR TO AN AGGREGATE CURRENT SITUATION OF TOTAL LIABILITY FOR ALL ACTIONS, LAWS AND REGULATIONS, MANY OVER WHICH THEY HAVE NO CONTROL.

THE OPEN-ENDED NATURE OF THIS LIABILITY HAS ALSO PLACED UNFAIR AND UNDUE BURDENS ON LOCAL GOVERNMENTS AND THEIR ELECTED AND APPOINTED OFFICIALS. THERE IS NO WAY FOR COUNTY OFFICIALS TO PLAN FOR, GUARD AGAINST OR INSURE THEMSELVES FROM THIS LIABILITY WHEN THEY DO NOT KNOW THE EXTENT OR SCOPE OF THEIR LIABILITY. SMALL COUNTIES AND OTHER SMALLER UNITS OF LOCAL GOVERNMENT ARE PARTICULARLY VULNERABLE TO THE DANGERS POSED BY TOTAL LIABILITY AND OFTEN POWERLESS TO GUARD AGAINST THE RISKS. EVEN LARGE COUNTIES WITH ADEQUATE RESOURCES ARE PUT IN A VERY DIFFICULT POSITION BY THE RECENT SUPREME COURT DECISIONS. THEY MUST INCREASINGLY CONSUME MORE OF THEIR TIME, MONEY AND RESOURCES DEFENDING THEMSELVES AGAINST SOMETIMES FRIVOLOUS CLAIMS WHILE REDUCING SERVICES FOR THEIR CITIZENS IN ALMOST ALL OTHER AREAS OF COUNTY OPERATION AND SERVICE DELIVERY. THE POOR ESTEEM WITH WHICH GOVERNMENT AT ALL LEVELS IS HELD THESE DAYS AND THE "RED FLAG" OF CIVIL RIGHTS VIOLATIONS (REAL OR IMAGINED) PUTS LOCAL GOVERNMENTS IN A VERY DEFENSIVE POSTURE WHEN LITIGATING THESE CLAIMS.

WE REALIZE WE HAVE PAINTED A VERY BLEAK PICTURE. THE CONCERNS EXPRESSED BY OUR MEMBERS AND THE GROWING TREND OF QUALIFIED INDIVIDUALS NOT TO RUN FOR OFFICE OR TO GIVE UP THEIR POSITIONS, HAS CONVINCED US THAT WE ARE NOT EXAGGERATING THE SITUATION. IN FACT, THE SITUATION IS LIKELY TO WORSEN AS THE FULL EFFECT AND INCENTIVES TO SUE UNDER SEC. 1983 ARE FULLY REALIZED. CONGRESS OR THE SUPREME COURT MUST TAKE STEPS TO ESTABLISH A BETTER BALANCE BETWEEN LEGITIMATE CIVIL RIGHTS CLAIMS AND THE NECESSITY FOR LOCAL GOVERNMENTS TO MAKE DECISIONS, PROVIDE SERVICES AND CARRY OUT THE WILL OF THE PEOPLE WHO ELECTED THEM WITHIN THE CONSTITUTION.

FORUM FOR SOLUTION

THE TWO MOST RECENT SUPREME COURT DECISIONS IN THIS AREA, MIDDLESEX COUNTY, ET AL. V. NATIONAL SEA CLAMMERS ASSOCIATION AND CITY OF NEWPORT, ET AL. V. FACT CONCERTS, INC., ET AL., WHILE GRATIFYING IN THEIR RESULTS, EXEMPLIFY PART OF THE PROBLEM WITH "LETTING THE COURTS DECIDE" THESE MATTERS TOTALLY. IN LESS THAN FOUR YEARS COUNTIES AND OTHER UNITS OF LOCAL GOVERNMENT HAVE GONE FROM TOTAL IMMUNITY TO TOTAL LIABILITY WITH NO PRESUMPTION OF GOOD FAITH

AND POTENTIAL LIABILITY FOR ALL FEDERAL LAWS AND REGULATIONS. WITH THESE TWO MOST RECENT DECISIONS THE SUPREME COURT SEEMS TO HAVE SAID THAT PUNITIVE DAMAGES CANNOT BE COLLECTED FROM LOCAL GOVERNMENTS AND PERHAPS ALL FEDERAL LAWS ARE NOT ACCOMPANIED BY SEC. 1983 LIABILITY. WE NOW HAVE HAD FIVE MAJOR CHANGES IN PUBLIC LIABILITY DEFINITION IN LESS THAN FOUR YEARS WITH UNDOUBTEDLY MORE TO FOLLOW.

WE BELIEVE THAT CONGRESS, NOT THE SUPREME COURT, SHOULD HAVE THE PRIMARY RESPONSIBILITY AND AUTHORITY TO AMEND AND/OR INTERPRET A STATUTE PASSED IN THE FIRST PLACE. MR. CHAIRMAN, IN YOUR OPENING STATEMENT AT THE MARCH 6 HEARING YOU STATED THAT CONGRESS COULD EITHER WAIT FOR THE SUPREME COURT TO CLARIFY THE THIBOUTOT DECISION OR TAKE ACTION ITSELF. WE URGE YOU TO PURSUE THE LATTER COURSE VIGOROUSLY REGARDING THIBOUTOT AND THE OTHER NEEDED CHANGES IN PUBLIC LIABILITY INTERPRETATION AND POLICY.

IN ADDITION TO THE LEGAL, LEGISLATIVE AND CIVIL RIGHTS ISSUES INVOLVED, THERE ARE BASIC PUBLIC POLICY AND FEDERALISM ISSUES TO BE CONSIDERED. THE FEDERAL GOVERNMENT AND STATE GOVERNMENTS HAVE BEEN LARGELY IMMUNE FROM SEC. 1983 SUITS, UNLESS THEY CHOOSE TO WAIVE THEIR SOVEREIGN IMMUNITY. LOCAL GOVERNMENTS ARE THEREFORE THE ONLY LEVEL OF GOVERNMENT WHICH IS LIABLE FOR SEC. 1983 CLAIMS. THUS, ANY FEDERAL OR STATE STATUTE OR PROGRAM WHICH IS ADMINISTERED THROUGH OR BY A LOCAL GOVERNMENT CARRIES WITH IT POTENTIAL SEC. 1983 LIABILITY. IS IT EQUITABLE FOR THE FEDERAL AND STATE GOVERNMENTS TO PASS LAWS AND MAKE REQUIREMENTS FOR LOCAL GOVERNMENTS UNDER WHICH THEY ARE LIABLE, WHILE THE ACTIVE LEVEL OF GOVERNMENT IS EXEMPT?

WE HAVE A SITUATION WHERE THE COURTS HAVE, IN OUR ESTIMATION, GONE WELL BEYOND THE BOUNDS OF THE INTENTIONS OF CONGRESS AND ITS AUTHORITY IN INTERPRETING A 110 YEAR OLD STATUTE. WE BELIEVE THAT IT IS THE RESPONSIBILITY OF CONGRESS TO AMEND ITS OWN LAWS.

SPECIFICS OF SOLUTION

AS WE STATED ABOVE, WE OPPOSE ANY DIMINUTION, IMPAIRMENT OR ENCROACHMENT OF AN INDIVIDUAL'S LEGITIMATE CIVIL RIGHTS. PART OF OUR JOB AS COUNTY ELECTED AND APPOINTED OFFICIALS LIKE YOURS, MR. CHAIRMAN, IS TO UPHOLD, DEFEND AND ENFORCE THE CONSTITUTION AND CIVIL RIGHTS OF ALL OUR CITIZENS. RECENT DECISIONS AND THEIR OVERALL EFFECT HAVE TENDED TO TRIVIALIZE THE ISSUE OF CIVIL RIGHTS BY ALLOWING MANY FRIVOLOUS OR CLEARLY SPECIOUS CASES TO BE

HEARD UNDER THE BANNER OF CIVIL RIGHTS. WE BELIEVE THAT THIS BROADENING OR WATERING DOWN OF THE CONCEPT OF CIVIL RIGHTS POORLY SERVES THE CAUSE OF LEGITIMATE CIVIL RIGHTS AND SOCIETY IN GENERAL.

WE WHOLEHEARTEDLY SUPPORT THE THRUST AND INTENTIONS OF S. 584 AND S. 585. WE VIEW THESE BILLS AS GOING A LONG WAY IN RESTORING THE BALANCE NEEDED IN THE AREA OF PUBLIC LIABILITY. OUR ONLY SERIOUS RESERVATION ABOUT THESE BILLS IS THAT THE TERM "EQUAL RIGHTS" LAWS MAY BE ALMOST AS VAGUE AND SUBJECT TO JUDICIAL INTERPRETATION AS THE "AND LAWS" PHRASE WHICH IT WOULD REPLACE. WE WOULD HOPE THAT THE TERM "EQUAL RIGHTS" COULD BE MORE CLEARLY DEFINED BY STATUTE AS PERTAINING TO CIVIL RIGHTS PROTECTIONS GRANTED UNDER THE CONSTITUTION OR FEDERAL STATUTES WHICH ARE SPECIFICALLY AND PRIMARILY AIMED AT DEFINING OR INSURING BASIC CIVIL RIGHTS FOR ALL CITIZENS. WE FEAR THAT THE "EQUAL RIGHTS" PHRASE MIGHT NOT GET US VERY FAR IN CLARIFYING THE CIVIL RIGHTS ACT OF 1871 AND THE SITUATION WE FIND OURSELVES IN TODAY. WE BELIEVE THAT THIS PHRASE, WHICH IS CENTRAL TO BOTH BILLS, SHOULD BE SUFFICIENTLY CLARIFIED TO STATE THE INTENTIONS OF CONGRESS AS PRECISELY AS POSSIBLE. THE NEED FOR PRECISION AND KNOWN LIABILITY IS ALMOST AS GREAT AS THE NEED FOR SUBSTANTIVE CHANGE IN THE APPROACH TO LOCAL GOVERNMENT LIABILITY.

NACo DOES NOT SUPPORT ANY LEGISLATIVE CHANGES TO THE ABILITY OF CITIZENS TO OBTAIN INJUNCTIVE OR DECLARATORY RELIEF AS A MEANS TO PROTECT THEIR BASIC CIVIL AND OTHER RIGHTS. WE RECOGNIZE THE NEED FOR INDIVIDUALS TO PURSUE THESE REMEDIES IN RELATION TO GOVERNMENT ACTIONS AND POLICIES.

WE SUGGEST THAT THE ISSUES OF ATTORNEYS' FEES AND PUNITIVE DAMAGES ALSO BE ADDRESSED IN THE OVERALL CONTEXT OF AMENDMENTS TO THE CIVIL RIGHTS ACT OF 1871. HERE AGAIN, WE BELIEVE THE SYSTEM HAS GOTTEN OUT OF BALANCE IN THAT THERE ARE NO COMPARABLE RISKS ON THE PART OF PLAINTIFFS OR ATTORNEYS IN BRINGING ACTIONS ON THE BASIS OF SEC. 1983. ATTORNEYS' FEES ARE RARELY AWARDED TO A LOCAL GOVERNMENT EVEN IF THEY SUCCESSFULLY DEFEND THE CASE. THIS SITUATION CONTRIBUTES TO THE DECISION OF MANY LOCAL GOVERNMENTS TO SETTLE CLAIMS OUT OF COURT WHICH THEN ENCOURAGES EVEN MORE CLAIMS TO BE BROUGHT.

PUNITIVE DAMAGES AGAINST LOCAL GOVERNMENTS SHOULD BE REVIEWED IN THE CONTEXT OF THE RECENT SUPREME COURT DECISIONS. WE AGREE WITH JUSTICE BLACKMUN, WRITING FOR THE MAJORITY IN THE FACT CONCERTS CASE, THAT, "NEITHER REASON NOR

JUSTICE SUGGESTS THAT SUCH RETRIBUTION SHOULD BE VISITED UPON THE SHOULDERS OF BLAMELESS OR UNKNOWING TAXPAYERS." THERE ARE ALREADY SUFFICIENT SANCTIONS AND PUNISHMENTS WHICH DISCOURAGE AND PENALIZE LOCAL GOVERNMENTS FROM ACTING IN A CAPRICIOUS AND UNFAIR MANNER TOWARD ITS CITIZENS. TO PUNISH THE TAXPAYERS BEYOND THE AWARD OF ACTUAL DAMAGES AND ATTORNEYS' FEES FOR WRONGFUL ACTIONS WOULD IN OUR JUDGMENT BE EXCESSIVE.

IN CONCLUSION, WE SUGGEST THAT CONGRESS IS THE APPROPRIATE FORUM FOR SORTING OUT THE COMPLEX LEGAL AND INTERGOVERNMENTAL ISSUES INVOLVED IN THE OVERALL ISSUE OF GOVERNMENTAL LIABILITY. WE WOULD HOPE THAT A FAIRER, MORE REASONABLE BALANCE COULD BE STRUCK TO PROTECT BOTH THE LEGITIMATE RIGHTS OF INDIVIDUALS AND THE COLLECTIVE RIGHTS OF SOCIETY AS A WHOLE.

WE THANK YOU, MR. CHAIRMAN, FOR YOUR LEADERSHIP AND INITIATIVE IN INTRODUCING THESE BILLS AND HOLDING THESE HEARINGS. WE ALSO THANK YOU FOR THE OPPORTUNITY TO TESTIFY BEFORE YOU TODAY. WE WOULD BE PLEASED TO ANSWER ANY QUESTIONS YOU OR THE OTHER SUBCOMMITTEE MEMBERS MIGHT HAVE.

Senator HATCH. Our next witness will be Prof. Leon Friedman. Professor Friedman teaches at the Hofstra University School of Law and has done a great deal of work on section 1983. He is representing the American Civil Liberties Union, a group which always enlivens our hearings.

Professor, we appreciate your being here, and we are looking forward to your testimony.

STATEMENT OF PROF. LEON FRIEDMAN, HOFSTRA UNIVERSITY, SCHOOL OF LAW, ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION

Professor Friedman. Thank you, Senator Hatch. It is a pleasure to be here, and I appreciate the invitation.

It is obvious that we have a slightly different perspective than the people from the counties, although I think there are some things that we do share.

First of all, in terms of what the Supreme Court has done over the last few years, it seems to us that they have struck their usual balance between trying to recognize the importance of section 1983 and trying to protect State and local governments and insuring that Government officials do their job.

In my testimony, I outline six or seven decisions over the last 2 years in which the Supreme Court has cut back on section 1983 and in ways, frankly, in which we believe that are curtailing the ability of citizens to vindicate their rights in section 1983 cases.

Aside from the two cases 2 weeks ago, the *Sea Clammers* case and *Facts Concerts* [and I will speak about them in more detail] the Supreme Court this term gave a very broad reading to the res judicata effect of State court judgments in section 1983 cases.

I refer to *Allen* v. *McCurry* in which the Supreme Court gave a very broad preclusion analysis to State court judgments and said that once the issue has been determined in a State court action it is rare, if not impossible, for someone to challenge that in a 1983 action.

Senator HATCH. Is that in a current case?

Professor FRIEDMAN. That is a current case.

Senator HATCH. It seems to me that case basically said [and maybe I am wrong] that States could not be sued for damages in section 1983.

Professor FRIEDMAN. That is the *Jordan* case. I am referring to *Allen* v. *McCurry*.

Senator HATCH. I am talking about *McCurry* where they held the doctrine of res judicata——

Professor FRIEDMAN. Yes, indeed—a very broad reading to res judicata. There was a whole doctrine of law on res judicata cases which said that we are not going to give the full effect of res judicata in cases where the 1983 plaintiff was an involuntary defendant in a prior State court action and could not raise all the same claims.

Now the Supreme Court has reversed themselves and said if there has been an action in State court, you are not going to relitigate it in the section 1983 regardless of how you came into State court.

In *Parratt* v. *Taylor*, which is another recent case, the Supreme Court gave another preclusion decision in which they say if there is an effective State court remedy, particularly in property loss damage cases, and you want to come into Federal court on 1983, you cannot do that—you cannot come into Federal court on 1983 because you are given due process of law under State remedies which may, in effect, put money in your pocket in the same way.

In the *Pennhurst* case, they cut back on certain rights that involuntary mental patients may have in State courts—another preclusion decision in the sense of saying: "Go to State court; do not come into Federal court on these kinds of actions because whatever remedy you have in State court is where your prime relief is going to be."

I just want to correct some impression about *Owen* and some of these other cases. People who have been falsely arrested or falsely imprisoned by a State policeman or a county policeman have been able to sue the county in State court for the last 100 years, and counties have not been able to raise a good faith defense.

If a policeman falsely imprisons someone and they are in jail for a week, 2 weeks, or whatever, no one thought of coming into Federal court on 1983. That is really something that has happened only in the last 10 or 20 years. They would simply go into State court and sue for false imprisonment, a good common law tort remedy that has been available for plaintiffs for the past 100 years. In those kinds of cases, there is no good faith defense.

If a county imprisons you or intends to imprison you and they do not have the legal right to imprison you, then they are liable.

Later section 1983 which has been brought over [and it may be in part because of the counsel fees problems, and I will refer to that a little later on] but before they would simply go into State court under a normal State court remedy and bring a suit for false imprisonment.

The whole idea that *Monell* and *Owen* have opened up the floodgates and allowed plaintiffs to sue and win in places where they would not be able to sue and win is simply not true.

The normal State tort remedies have been in place; they have been available; they have been utilized; and damage remedies have been made available in those situations, and counties and cities have had to set aside money for those kinds of cases, not because of 1983, not because of *Monell,* not because of *Owen,* but simply because the normal tort remedies available in the State have always provided for relief in that kind of situation.

I would like to turn to S. 584 in particular. The ACLU does not support the idea of S. 584, and I would like to indicate why.

Our first point is that the Supreme Court having given with one hand, of course, finds a way of taking back with the other, and in the *Sea Clammers* decision of two weeks ago they have cut back on *Maine* v. *Thiboutot* so that its effect is really in a very limited area and may be limited to Social Security Act cases alone.

Senator HATCH. This would seem to say that [addressing section 1983] the existence of express remedies in both acts precluded any remedy that otherwise would be available under section 1983.

Professor FRIEDMAN. That is correct.

Senator HATCH. In addition, Justice Powell mentioned one other test which might be applicable to determine if section 1983 creates a remedy under the acts. That is whether the statute at issue was the kind that created enforceable rights under section 1983. Do you think that that is a conclusive test?

Professor FRIEDMAN. That is what the Supreme Court now says.

Senator HATCH. There is a lot of authority that says that that test was left open in the way the opinion is written and that that is not a closed-in test.

Professor FRIEDMAN. It was Justice Powell who wrote the dissent in *Maine* v. *Thiboutot.* He said that if you read "and laws" in this very broad way, then there is a whole series of Federal statutes which could conceivably create enforceable rights in Federal court under 1983.

Then he writes the majority opinion, and he writes it in a way [again, applying his test, the kind of statutes that he refers to] and, Senator Hatch, you also referred to these statutes when you introduced the bill—the management of national parks, administering forest lands, or the Small Business Investment Act.

If you apply the twofold test of *Sea Clammers* to those kinds of statutes, they simply do not seem to be the kind of statutes that create enforceable rights under 1983.

So Justice Powell has closed the door, it seems to me, about 95 percent of the way. About the only statute that *Maine* v. *Thiboutot* appears to affect and in which it appears to keep open the possibility of a 1983 case is the Social Security Act.

In fact, that was the statute involved in *Thiboutot* and the statute which is primarily the statute which does seem to create enforceable rights where individuals seek money damages as a result of a misreading of the Social Security Act and for which a remedy may be desirable, but this whole list of other Federal statutes seems to be just thrown out of the window as a result of the *Sea Clammers* case.

Senator HATCH. Let me see if I understand you better and maybe ask one other question. I do not mean to interrupt you during your testimony, but I think it is an important point.

In *Sea Clammers,* the Court held that the express remedies in a statute demonstrate that Congress intended to supplant any remedy that would be available under section 1983. This alone does not greatly diminish, it seems to me, the number of statutes which can be brought under section 1983. However, the second part of the two-pronged test you mention in your statement seems, in my opinion, to be left open in *Sea Clammers.*

Would you explain at this point in your testimony the criteria the Court would use in the second test you mentioned to determine if the statute creates enforceable rights under section 1983?

Professor FRIEDMAN. Let me just refer to some of the statutes, and I think I can explain it. Let me take a look at the first one, the Federal Insecticide, Fungicide, and Rodenticide Act.

That is a very broad statute requiring all kinds of labeling requiring when insecticides are sent in interstate commerce. There are all kinds of remedies provided for in the statute against people who mislabel their products. The Federal agencies have the ability to come in with all kinds of enforcement proceedings.

Who is going to bring a suit if that statute is violated? That is the kind of law which has the built-in mechanism that is the first part of the test.

Would that also create enforceable rights on someone who is injured as a result of the violation of that statute? It is very hard to see how that would happen.

If there was mislabeling that occurred and someone died, there would be a wrongful death action under the local State tort action, but it would not be the kind of 1983 action. It is not like money is provided for under that statute which is not being handed over. I think that is the kind of test that they were worried about in 1983.

The Social Security Act says that certain people shall get certain moneys. If the State, in administering the act, says: "Well, you are not entitled to this money," that clearly is the kind of law which creates enforceable rights.

Senator HATCH. My point is that there were no criteria established, and therefore who is to say?

Professor FRIEDMAN. The Federal courts are to say because they are usually the ones.

Senator HATCH. So it still leaves it pretty wide open.

Professor FRIEDMAN. There is another principle that comes into play. The Supreme Court in *Cort* v. *Ash* provided the mechanism for deciding whether there is a private cause of action. The *Cort* v. *Ash* standard is the standard that I think they referred to in the second part of the test: Is there a private cause of action?

If you will look at the Supreme Court decisions after *Cort* v. *Ash,* they have read them rather narrowly, and I think they have tried to cut back on the creation of private causes of action.

The underlying congressional statute has to be one that, in effect, gives a private remedy—gives an ordinary citizen a right that should be enforceable in a 1983 suit.

If you will look at this list of statutes, you will note that very few of them, if any, meet that twofold test. It is something like the Social Security Act. I would like to turn to that and say why.

The real effect of S. 584 would be to knock out a lot of suits which have been brought and have been recognized as creating enforceable rights in favor of the person from whom money is being taken.

The Supreme Court has had a number of cases in which they have decided that local, State, or county, or city authorities are misreading the Social Security Act.

The example I use in my testimony is a case that came up just last year *Miller* v. *Youakim* in which a unanimous Supreme Court approved a unanimous decision by the Seventh Circuit and affirmed a decision by a Federal district court judge.

In every one of those cases the Supreme Court held that the local Illinois authorities were wrong in the way in which they were reading the Social Security Act. They had denied foster care payments to certain foster care children who had been placed in foster homes with relatives.

The Supreme Court said Illinois authorities were wrong in distinguishing between putting someone in foster care in a relative's home and putting someone in foster care in a nonrelative's home.

The effect of 584 is to stop that kind of a lawsuit so that the Illinois authorities, if they misread the Social Security Act, will not have an effective Federal remedy against them for misreading the law.

Every Federal judge who looked at that case said the Illinois authorities were wrong. Why is it desirable to have the Illinois authorities continue in their erroneous reading of the Social Security Act?

If they may read it one way the Iowa authorities may read it another way, and if each State is going to be the final arbiter of how the Social Security Act is to be read, then we are going to have hopeless confusion about the whole thing to the detriment of the States in terms of planning, if that is really what we are concerned about.

It is not desirable to have each State read the Social Security Act in a way contrary to the intent of Congress and in error as far as the regulations are concerned.

The mechanism that we have had for correcting the erroneous interpretation of the Social Security Act is a 1983 case. It may not be that damages may not be paid out. It may be an injunctive action. It may be a declaratory judgment action.

In fact, in *Zuern* v. *Jordan*, which was an attempt to get damages out of the State treasury, the Supreme Court said you cannot do that because the 11th amendment bars retroactive relief in that particular case.

So there really are mechanisms in place for stopping the draining of the State treasuries if there is an erroneous reading of the Social Security Act, but in terms of prospective relief, in terms of how should the act be administered in the future, 1983 has been the mechanism for handling that kind of an erroneous reading of Federal law.

It seems to me totally unnecessary and totally unwise to create a system in which you are going to have 50 different interpretations of the Social Security Act with only the Supreme Court taking a direct case out of the State courts to correct an erroneous interpretation of law. That is simply not the way we have done it. We rely on the Federal courts in each circuit to correct any misreading of Federal law.

As I said, the main effect has been in the Social Security Act which uniquely among all these other statutes does seem to create enforceable rights and does not have the built-in enforcement mechanism that we need.

So, the effect of 584 would be to take out—the real prime effect would be to knock out the kind of Social Security Act mechanism that has been in place over the last 10 or 15 years for correcting erroneous State reading of that law.

Senator Hatch, if the real problem is in attorney's fees in these kinds of cases, then amend 1988 not 1983. If the real problem is that somehow as a result of the *Thiboutot* case—and it has only been around for about a year—there are a lot of these lawsuits and people bringing them because of the attorney's fees statutes, then that is the way to look, not to knock out 1983—not to amend 1983—which serves this important purpose of creating uniform State interpretation of Federal law. That is what it is there for.

Let me say this about 1988: 1988 provides that if frivolous lawsuits are brought by the plaintiffs they are going to have to pay the defendants' attorney's fees, and there are already a half a dozen cases I know of in which, as a result of 1988, a frivolous lawsuit was brought by the plaintiff, the plaintiff has to pay the county's attorney's fees.

Senator HATCH. Of course, you and I both know that most of the plaintiffs are incapable of paying those attorney's fees. It is a nice thing to have that alternative, but it is really an impracticable one.

If the attorneys had to pay the attorney's fees, maybe that would be another approach. That is where it really lies, you know.

If some plaintiff comes in to you as an attorney and you know he does not have a case but you know that you can extort money by forcing the county or municipality, as some of these officials have indicated, into settling for defense costs or thereabouts, which they are going to do because—look, in the last 4 years we have had 300 new judges.

President Carter put 300 judges—45 percent of the total Federal Judiciary—on the bench. Some here in this honorable body think that almost all of those judges are what you would call judicial activists or people who believe that all lawsuits should be won by the plaintiff in these areas.

Frankly, I cannot blame any municipality for wanting to settle for defense costs rather than take the risk of that type of a judiciary, which is now prevailing in this land, finding against them out of compassionate sympathy for those who claim they have been robbed no matter how light the evidence might have been.

There is a real problem here, and I share your concern. I do not want to see anybody lose a right of action or lose the right to enforce civil rights just because of our desire to save money for municipalities in this country and to preserve the right of cities to survive, which certainly may be a little more dramatic way of saying it than reality would permit.

It is still a serious problem, and municipalities have come in here saying:

> Hey, we have got to have some relief. This stuff is just killing us, and it is costing us unnecessary, magnificent amounts of money that we can no longer afford, and, frankly, the courts are going along with it in an unprecedented way.

Professor FRIEDMAN. Let me refer to that. A municipality gets sued if the roads have potholes in them and a car goes over a pothole and someone gets injured. Municipalities and counties have been sued for as long as we can remember for the negligence of their drivers.

Senator HATCH. But very seldom are attorney's fees given in those cases. I do not know of any case.

Professor FRIEDMAN. That is true. Before you get attorney's fees, you have to win.

Senator HATCH. But I might also add that attorney's fees are not given in those cases; and, No. 2, because there has been a long-term hearing of those cases, as a general rule the awards are reasonable awards, but when you get into these civil rights cases and you get a judicially activist judge who does not give a damn what the facts are and he just has his own viscera to determine what the damages are, you wind up with magnificent sums in damages.

Professor FRIEDMAN. I have written an article about the damage awards. I have not found them particularly high except in the most egregious cases.

Senator HATCH. Would you send me a copy of that?

Professor FRIEDMAN. I have a copy here, as a matter of fact. I will be happy to put it in the record.

Senator HATCH. Without objection, it will be inserted at this point.

[Material follows:]

Constitutional Torts

Leon Friedman,
Professor of Law, Hofstra University School of Law, Long Island, New York

"Bivens" refers to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); "section 1331" refers to 28 U.S.C. §1331; "section 1983" refers to 42 U.S.C. §1983; and "FTCA" refers to the Federal Tort Claims Act.

A. The Bivens Doctrine

1. Under *Bivens*, damages may be recovered from federal officials for violation of constitutional rights.

    a. The fourth amendment prohibition of unreasonable searches and seizures acts as an independent limitation on federal police powers and does not cover exactly the same interests as state trespass or assault laws. Fourth amendment interests may be "inconsistent or even hostile" to interests protected by local tort law. *Bivens*, at 394. Nor did Congress reject a federal remedy for an illegal search and arrest, and it did not remit a victim "to another remedy, equally effective in the view of Congress." *Id.* at 397.

        i. What if Congress explicitly rejects a remedy or generally provides for another remedy as in the FTCA? *See Carlson v. Green*, 100 S.Ct. 1468 (1980); *Davis v. Passman*, 442 U.S. 228 (1979); *Hernandez v. Lattimore*, 612 F.2d 61 (2d Cir. 1979).

    b. When rights under the fourth amendment are asserted, federal courts have subject-matter jurisdiction under section

1331, which confers upon the federal district courts original jurisdiction in all civil actions in which the matter in controversy arises under the Constitution, laws, and treaties of the United States.

2. The cause of action in *Bivens* seems identical in almost every respect to a cause of action asserted against state officers under section 1983, which allows a suit for the deprivation of a constitutional right under color of law. *See Carlson v. Green*, 100 S.Ct. 1468 (1980); *Butz v. Economou*, 438 U.S. 478 (1978); *Paton v. LaPrade*, 524 F.2d 862 (3d Cir. 1975); *Mark v. Groff*, 521 F.2d 1376 (9th Cir. 1975). Some differences, though, do exist:

    a. Respondeat superior is not applicable in the *Bivens* situation, since the United States would be liable only under the FTCA, but it would apply under section 1983. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978).

    b. Survivorship problems may be different under section 1983 and *Bivens*. *Compare Robertson v. Wegmann*, 436 U.S. 584 (1978), *with Carlson v. Green*, 100 S.Ct. 1468 (1980) (*Bivens* claim survives the death of a victim even if a comparable claim would not amount to $10,000 under state law).

    c. All constitutional rights are covered by section 1983, but the Supreme Court has not as yet declared all of them covered by *Bivens*. *See Davis v. Passman*, 442 U.S. 228 (1979).

    d. Under section 1983, no jurisdictional amount is required when there is a violation of constitutional rights. 28 U.S.C. §1343. Section 1331, which is applicable to *Bivens*, requires that the matter in controversy exceed $10,000 unless the action is "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity."

        i. The House Report states that no jurisdictional amount is required under section 1331 if the official acted "under color of law." H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 14-15, reprinted in [1976] U.S. Code Cong. & Ad. News 6135. A recent proposal would eliminate in all federal-question cases the need for a $10,000 amount in controversy. S. 2357, 95th Cong., 2d Sess. (1980), 124 Cong. Rec. S. 8831 (daily ed. June 28, 1980).

e. It may not be possible to bring both a *Bivens* and a section 1983 cause of action if the latter is available, since they overlap. *Cullen v. Margiotta*, 618 F.2d 226 (2d Cir. 1980); *Hearth, Inc. v. Department of Public Welfare*, 617 F.2d 381 (5th Cir. 1980).

3. The same acts may give rise to liability under both *Bivens* and the FTCA. For example, a bad arrest or search by a federal agent may be a fourth amendment violation as well as a false arrest and trespass under local law, cognizable under the FTCA. Nonetheless, *Bivens* and the FTCA are distinguishable.

a. A suit under *Bivens* is always against individual federal officials, while a suit under FTCA is always against the United States.

b. The statutes of limitations differ, being two years for the FTCA under 28 U.S.C. section 2401(b) and varying periods for *Bivens*, depending on local state law.

c. There are no punitive damages and jury trials under the FTCA. 28 U.S.C. §§2674, 2402.

d. The FTCA covers only local, common-law tort injuries, not constitutional torts as defined by *Bivens*. "We do not believe that the Federal Tort Claims Act comprehended *federal constitutional* torts in its reference to the 'law of the place' under §1346(b)." *Birnbaum v. United States*, 588 F.2d 319, 327 (2d Cir. 1978).

e. Some actions — like a common-law tort not rising to a constitutional violation, such as improper medical care for federal prisoners — may be covered only by the FTCA, while others, such as first and fifth amendment due-process violations, which have no common law tort analogue, can be filed only under *Bivens*.

f. Plaintiff must make an administrative request for compensation before bringing suit under the FTCA; generally, there is no similar requirement under *Bivens*, although it may be necessary in prisoner suits on prison conditions. *Brice v. Day*, 604 F.2d 664 (10th Cir. 1979), *cert. denied*, 100 S.Ct. 1045 (1980). *Cf. Streeter v. Hopper*, 618 F.2d 1178 (5th Cir. 1980); *Patsy v. Florida International Univ.*, 612 F.2d 946, *rehearing granted*, 617 F.2d 442 (5th Cir. 1980).

4. *Bivens* covers a number of constitutional violations.

    a. First amendment rights. *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977) (arrest of the audience of a Congressman); *Paton v. LaPrade*, 524 F.2d 862 (3d Cir. 1975) (agents of the Federal Bureau of Investigation investigated 15-year-old for writing letter to Socialist Workers Party for class project); *Butler v. United States*, 365 F. Supp. 1035 (D. Hawaii 1973) (restriction on demonstration at army base).

    b. Fifth amendment rights. *Davis v. Passman*, 442 U.S. 228 (1979) (Congressman did not promote assistant because she was a woman; since Congress excluded itself from Title VII, only a *Bivens* action could be filed); *Micklus v. Carlson*, 28 Crim. L. Rep. (BNA) 2081 (3d Cir. 1980) (violation of Youth Corrections Act); *Loe v. Armistead*, 582 F.2d 1291 (4th Cir. 1978), *cert. denied sub nom. Moffitt v. Loe*, 100 S.Ct. 1865 (1980) (pretrial detainee punished by improper medical treatment); *Apton v. Wilson*, 506 F.2d 83 (D.C. Cir. 1974).

    c. Sixth amendment rights. *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144 (D.D.C. 1976).

    d. Eighth amendment rights. *Carlson v. Green*, 100 S.Ct. 1468 (1980) (overlap with a fifth amendment due process violation if beating by a prison guard is "deliberately administered for a penal or disciplinary purpose"); *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973) (medical malpractice becomes an eighth amendment violation if there is a "deliberate indifference" to a prisoner's "serious medical needs").

5. A *Bivens* action is not foreclosed by the existence of an alternative cause of action, such as the FTCA. *Carlson v. Green*, 100 S.Ct. 1468 (1980). The FTCA was not a substitute for a *Bivens* action, since it was enacted before *Bivens* was decided; *Bivens* also is more of a deterrent against federal officials than a FTCA claim against the United States; punitive damages and a jury are available in a *Bivens* action but not under the FTCA; and local state tort law is the key to recovery under the FTCA, while federal constitutional rights are protected by *Bivens*.

B. Coverage

1. Not every tort by a federal official is a constitutional violation; only a violation of a constitutional right gives rise to a *Bivens* action.

2. *Defamation*

   a. The distribution by the chief of police of handbills calling the plaintiff, who had been arrested but not convicted, an "active shoplifter" did not give rise to a section 1983 action. Neither the damage to reputation nor the invasion of privacy involved a federal constitutional right. The distribution did not constitute punishment without due process of law. The only relief is under state defamation law. *Paul v. Davis*, 424 U.S. 693 (1976).

   i. *See also Cook v. Houston Post*, 616 F.2d 791 (5th Cir. 1980) (campaign to discredit police chief); *Green v. DeCamp*, 612 F.2d 368 (8th Cir. 1980) (report by state senators criticizing police chief was not actionable under section 1983); *Havas v. Thornton*, 609 F.2d 372 (9th Cir. 1979) (complaint that state official brought malicious actions to humiliate plaintiffs did not allege a violation of a constitutional right); *Jones v. Palmer Media, Inc.*, 478 F. Supp. 1124 (E.D. Tex. 1979) (no constitutional right violated by the release of embarrassing material about a candidate for public office by a congressional administrative assistant).

b. Recovery is possible when defamatory remarks are made by state officers as part of a racially motivated campaign to discredit and damage the plaintiffs. *Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979), *cert. denied*, 100 S.Ct. 1351 (1980).

i. *See also Owens v. City of Independence*, 100 S.Ct. 1398 (1980) (police chief fired with stigmatizing charges about him publicized by city council); *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980) (injury to personal and business reputations in conjunction with a fourth amendment violation); *Zaccagnini v. Morris*, 478 F. Supp. 1199 (D. Mass. 1979) (defamation in the course of an improper termination of employment); *Safeguard Mutual Insurance Co. v. Miller*, 477 F. Supp. 299 (E.D. Pa. 1979) (defamation was part of a program to drive company out of business).

3. *Medical malpractice*

a. "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). The refusal to set up an alcoholism treatment program in prison is not an eighth amendment violation. *Pace v. Fauver*. 479 F. Supp. 456 (D. N.J. 1979).

i. *But see Fielder v. Bosshard*, 590 F.2d 105 (5th Cir. 1979) (since sheriff had been informed by the prisoner's relatives that prisoner was sick, sheriff's refusal to act when told by deputies that prisoner was behaving in a bizarre manner led to a $70,000 award).

4. *Arrest and imprisonment*

a. A sheriff's arrest of the wrong man under a facially valid arrest warrant does not constitute an illegal seizure for fourth amendment purposes. Since the warrant conformed to the requirements of the amendment, no constitutional rights were violated even if the sheriff's actions might constitute false imprisonment under state tort law that only required an intent to imprison. Had the detention continued for a long period of time after the arrest while the detainee continued to claim that he was the wrong person, the detainee might have been deprived of liberty without due process of law. But imprisonment for three days over a long weekend did not reach that point. *Baker v. McCollan*, 443 U.S. 137, *on remand*, *McCollan v. Tate*, 601 F.2d 903 (5th Cir. 1979). *Accord*, *Williams v. Anderson*, 599 F.2d 923 (10th Cir. 1979) (keeping prisoner in jail one extra day because of a mistake of the timekeeper is not actionable).

i. But if the police arrest an individual as drunk and put him in a drunk-tank for 19 hours after he had a stroke, there could be a constitutional violation if the jury could find no probable cause for the original arrest. *Reeves v. City of Jackson, Mississippi*, 608 F.2d 644 (5th Cir. 1979).

b. Merely sending a prisoner to a maximum-security prison is not an eighth amendment violation. *Leonardo v. Moran*, 611 F.2d 397 (1st Cir. 1979). The denial of parole is not actionable, either. *Jackson v. Reese*, 608 F.2d 159 (5th Cir. 1979). So, too, an improper discipline charge against a prisoner brought by a prison guard, even though it might be actionable at common law as a malicious prosecution, is not a violation of a constitutional right. *Riggs v. Miller*, 480 F. Supp. 799 (E.D. Va. 1979).

c. On the other hand, when a prisoner was severely beaten by guards for refusing to leave his cell, a section 1983 claim was upheld. *Owens v. Haas*, 601 F.2d 1242 (2d Cir. 1979), *cert. denied sub nom. Nassau County v. Owens*, 100 S.Ct. 483 (1980) (both fifth and eighth amendment rights were asserted). *Accord*, *Martinez v. Rosado*, 614 F.2d 829 (2d Cir. 1980) (beating of a prisoner by a guard after a violation of prison rules); *Holmes v. Goldin*, 615 F.2d 83 (2d Cir. 1980) (guards deliberately kept cell open to allow another inmate to attack the plaintiff).

i. *But see Williams v. Kelley*, 624 F.2d 695 (5th Cir. 1980) (when a prison guard used a chokehold to subdue prisoner and killed him by strangulation, due process was not violated since there was no abuse of power).

5. *Fifth amendment violations*

a. See *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980) (substantive due process violation by a teacher who imposed corporal punishment); *McCulloch v. Glascow*, 620 F.2d 47 (5th Cir. 1980) (procedural due process violation). *Bishop v. Tice*, 622 F.2d 349 (8th Cir. 1980) (claim that employee lost his job because of a threat to lodge false criminal charges against him).

6. *No constitutional violations*

a. *Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736 (6th Cir. 1980) (since there is no constitutional right to enter a racetrack, due process was not violated when patron was excluded without a hearing).

b. *Higbee v. Times-Advocate*, 5 Media L. Rep. (BNA) 2372 (S.D. Cal. 1980) (press invited to be present when a search warrant was executed at the plaintiff's residence); *Holman v. Central Arkansas Broadcasting Co.*, 610 F.2d 542 (8th Cir. 1979) (press was invited to overhear the boisterous activity of the plaintiff in jail).

c. *Sami v. United States*, 617 F.2d 755 (D.C. Cir. 1979) (false claim that extraditable offense was committed, leading to arrest by German authorities).

d. In *Ronnei v. Butler*, 597 F.2d 564 (8th Cir. 1979), a prisoner was bitten by a bat that a prison guard killed and flushed down the toilet. As a result, prisoner had to receive painful rabies shots. Since there was no deliberate indifference on the part of the guard, the eighth amendment was not violated.

e. *Housand v. Heiman*, 594 F.2d 923 (2d Cir. 1979) (federal prisoner sues court-appointed attorney for inadequate representation; even if legal malpractice committed, no constitutional right could be asserted). *See Brown v. Schiff*, 614 F.2d 237 (10th Cir. 1980).

f. *Heard v. Lafourche Parish School Board*, 480 F. Supp. 231 (E.D. La. 1979) (failure by a school principal to provide protection for a student); *Guyton v. Phillips*, 606 F.2d 248 (9th Cir. 1979), *cert. denied*, 100 S.Ct. 1276 (1980) (failure of police to investigate a killing).

g. *Reilly v. Leonard*, 24 CRIM. L. REP. (BNA) 2190 (D. Conn. 1978) (prosecutor's report stated that the defendant murdered his mother; defendant eventually cleared of the charges).

7. *A constitutional violation existed*

a. *Tinetti v. Wittke*, 620 F.2d 160 (7th Cir. 1980) (strip search for traffic violations).

b. *Vasquez v. Snow*, 616 F.2d 217 (5th Cir. 1980) (search in a third party's home for a fugitive without probable cause to believe that he was there).

c. *Brule v. Southworth*, 611 F.2d 406 (1st Cir. 1979) (dismissal of a public employee for exercising his first amendment rights).

d. *M.M. v. Anker*, 607 F.2d 588 (2d Cir. 1979) (highly intrusive strip search of student by principal).

e. *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (police who left young children unattended at the side of road after arresting custodian violated due process, since their actions shocked the conscience).

f. *Reussow v. Eddington*, 483 F. Supp. 739 (D. Colo. 1980) (discharge of police officer for exercising first amendment rights).

g. *Hermes v. Hein*, 479 F. Supp. 820 (N.D. Ill. 1979) (manipulation of promotion list for police to favor the members of one political party).

h. *Jabara v. Kelley*, 476 F. Supp. 561 (E.D. Mich. 1979) (unlawful intrusion by federal agents into the lawful political actions of an Arab lawyer).

8. Any governmental action that violated equal protection may be actionable. *Flores v. Pierce*, 617 F.2d 1386 (9th Cir. 1980) (denial of liquor license based on race).

   a. Plaintiff, however, must show impermissible discrimination. *LeClair v. Saunders*, 627 F.2d 606 (2d Cir. 1980) (no selective enforcement of milk inspection regulations proved); *Foxman v. Renison*, 625 F.2d 429 (2d Cir. 1980) (tax audit).

9. It may be possible to join a federal civil rights claim with a pendant common law tort claim, and if the former is not dismissed before trial, go to the jury on both theories. *Traver v. Meshriy*, 627 F.2d 934 (9th Cir. 1980) (when a bank security guard arrested a customer, a section 1983 claim was tried with a pendant state claim for false arrest); *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980) (a due process claim by a child subject to corporal punishment was joined with an assault and battery claim); *Clappier v. Flynn*, 605 F.2d 519 (10th Cir. 1979) (when prisoner was beaten by a fellow inmate, both eighth amendment and negligence claims were submitted to the jury, but only one recovery was allowed).

C. State of Mind

1. A specific intent to violate constitutional rights, required, according to *Screws v. United States*, 325 U.S. 91 (1945), in criminal prosecutions under 18 U.S.C. section 242, is not necessary in a civil case.

   a. In *Monroe v. Pape*, 365 U.S. 167, 187 (1961), the Court noted that the word "willfully" appears in 18 U.S.C. section 242 but not in section 1983. The civil remedy "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."

2. As in any tort case, the actor must generally intend to do the act that inflicts the injury — *i.e.*, he must intend to arrest or to imprison in order to be liable for false arrest or false imprisonment. *See Bryan v. Jones*, 530 F.2d 1210 (5th Cir.), *cert. denied*, 429 865 (1976).

   a. Malice or wrongful motive is not generally required, except for special torts like malicious prosecution. A discriminatory intent is necessary for a claim of denial of equal protection. *Washington v. Davis*, 426 U.S. 229 (1976).

3. There is a question whether the actor must intend, or foresee the possibility of, injury to a particular constitutional interest of the plaintiff.

4. The action must "cause" the injury.

   a. In *Martinez v. California*, 444 U.S. 277, 285 (1980), the action of the parole board in releasing an inmate who committed a later crime did not cause the injury arising from the crime. "[D]ecedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law."

   b. *See Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980) (commissioners who cut back on fees for court reporters did not "cause" the delay in processing appeal). *See also Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979), *cert. denied*, 100 S.Ct. 710 (1980); *Redmond v. Baxley*, 475 F. Supp. 1111 (E.D. Mich. 1979).

5. Generally, only an intent to act and a reasonably foreseeable injury to a constitutional right are necessary to establish the requisite state of mind.

a. In *Popow v. City of Margate*, 476 F. Supp. 1237, 1242 (D. N.J. 1979), an officer shot and killed an innocent bystander through gross negligence. A cause of action was stated under section 1983. "Here . . . the police officer meant to shoot his gun, so . . . there was a general intent to do the act which caused the injury."

b. *But see Rhodes v. Robinson*, 612 F.2d 766 (3d Cir. 1979) (the claim of a prisoner who accused guards of causing him emotional distress by beating up another prisoner was deficient because no intent to injure him was alleged).

c. *See generally* Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State-of-Mind Requirement*, 46 U. Cin. L. Rev. 45 (1977).

6. Often, the state of mind required depends upon the nature of the constitutional right asserted. The eighth amendment protects a right to be free of action with a particular state of mind associated with it — "deliberate indifference," "cruel and unusual" punishment. Fourth amendment rights are different, involving a right to be free of unreasonable searches or seizures. If an officer acts without probable cause or uses excessive force in making an arrest, unreasonableness is shown and no other state of mind is necessary.

a. See Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 Yale L. J. 447, 460 (1978); *Douthit v. Jones*, 619 F.2d 527 (5th Cir. 1980) (sheriff held liable under section 1983 for falsely imprisoning the plaintiff because sheriff erroneously thought certain court costs had not been paid; no good-faith defense possible); *Schoneberger v. Hinchcliffe*, 28 Crim. L. Rep. (BNA) 2098 (D. Vt. 1980) (good-faith defense is possible).

D. Negligence

1. The Supreme Court examined the issue of negligence in two cases: *Procunier v. Navarette*, 434 U.S. 555 (1978), and *Baker v. McCollan*, 443 U.S. 137 (1979). *Procunier* was ultimately

decided on the ground that the right to send mail from prison had not been authoritatively established at the time the prison officials withheld the mail, thereby permitting a good-faith defense. In *McCollan*, no constitutional right was involved since the officers acted on the basis of a valid arrest warrant.

a. On the negligence point, the Court indicated in *McCollan* that no blanket rule can be established.

> [W]hether an allegation of simple negligence is sufficient to state a cause of action under §1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations. 443 U.S. at 139-140.

2. If a prison guard negligently runs over a prisoner while driving a truck in the prison yard, no constitutional violation occurs, either because no constitutional right was involved, there was no intent to act with respect to a foreseeable constitutional right, or a simple or single act of negligence should not be actionable. *Beard v. Mitchell*, 604 F.2d 485 (7th Cir. 1979); *Bonner v. Coughlin*, 545 F.2d 565 (7th Cir. 1976); *Snyder v. Blankenship*, 473 F. Supp. 1208 (W. D. Va. 1979), *aff'd*, 618 F.2d 104 (4th Cir. 1980). *But see Norton v. McKeon*, 444 F. Supp. 384 (E.D. Pa. 1977), *aff'd*, 601 F.2d 575 (3rd Cir. 1979). But if the prison supervisors train the guards improperly, so that the guards drive the trucks carelessly into the midst of a prison church service, the result may be different, depending upon the nature of the constitutional right and the level of responsibility of the official. *See Navarette v. Enomoto*, 536 F.2d 277 (9th Cir. 1977), *reversed on other grounds sub nom. Procunier v. Navarette*, 434 U.S. 555 (1978); *Parratt v. Taylor*, 620 F.2d 307 (8th Cir. 1980), *cert. granted*, 101 S.Ct. 315 (1980) (prison officers negligently lost property of inmate). Note, *Actionability of Negligence under Section 1983 and the Eighth Amendment*, 127 U. Pa. L. Rev. 533 (1978).

3. Gross negligence or recklessness is clearly actionable.

a. **Gross negligence or recklessness on the part of a state official, that is, the proceeding in the face of a known danger or the total disregard of** potential danger, entails abuse of official power or position which is the target of §1983. *Popow v. City of Margate*, 476 F. Supp. 1237, 1243 (D. N.J. 1979).

b. *See Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979); *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970); *Wager v. Hasenkrug*, 486 F. Supp. 47 (D. Mont. 1980) (police do nothing when notified about blind man walking on a railroad track except to lead him to a park where he died from pancreatitis).

4. Negligence that may affect many individuals subject to the official's action is more likely to give rise to a cause of action. *Bryan v. Jones*, 530 F.2d 1210, 1215 (5th Cir. 1976) (en banc) (sheriff is not liable for negligently keeping one prisoner in jail after discharge by the grand jury, but if "he negligently establishes a record keeping system in which errors of this kind are likely, he will be held liable"). *See* Friedman, *The Good-Faith Defense in Constitutional Litigation*, 5 HOFSTRA L. REV. 501 (1977); *Mann v. Village of Walden*, 482 F. Supp. 154 (S.D.N.Y. 1979) (there is a difference between "abusive" and "nonabusive" negligence; when a state officer engages in an abuse of power, federal judicial intervention is appropriate).

5. A single act of negligence is not actionable. *Patzig v. O'Neil*, 577 F.2d 841, 848 (7th Cir. 1978); *Onley v. Simms*, 476 F. Supp. 974 (E.D. Pa. 1979).

6. In a prison situation, the risk of harm to inmates may require a higher standard of care, thus giving rise to liability for negligence. *Withers v. Levine*, 615 F.2d 158 (4th Cir. 1980); *Ali v. Gibson*, 483 F. Supp. 1102 (D.V.I. 1979).

7. The negligent supervision of subordinates can give rise to liability. *McClelland v. Facteau*, 610 F.2d 693 (10th Cir. 1979); *Davis v. Zahradnick*, 600 F.2d 458 (4th Cir. 1978) (sheriff failed to supervise and control prison guard who did nothing when another inmate attacked plaintiff); *Sims v. Adams*, 537 F.2d 829 (5th Cir. 1976); *Beverly v. Morris*, 470 F.2d 1356 (5th Cir. 1972); *Roberts v. Williams*, 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971) (superintendent

failed to train and supervise a prison trustee who shot a prisoner); *Redmond v. Baxley*, 475 F. Supp. 1111 (E.D. Mich. 1979) (warden failed to take precautions against inmate rape in prison infirmary, although he had received reports on the general problem). *See also Dewell v. Lawson*, 489 F.2d 877 (10th Cir. 1974) (police chief's failure to establish proper identification procedures led to diabetic being imprisoned as a common drunk).

a. But if a supervisor did not know of any violent tendencies of a subordinate and had no responsibility to train him, the supervisor is not liable. *Wilson v. Beebe*, 612 F.2d 275 (6th Cir. 1980) (superiors are not liable for unusual accident by state policeman); *Whitehurst v. Wright*, 592 F.2d 834 (5th Cir. 1979).

8. A public defender may be sued under section 1983 for negligent representation. *Dodson v. Polk County*, 27 Crim. L. Rep. (BNA) 2535 (8th Cir. 1980).

E. The Liability of Superiors

1. Different tests are to be applied with respect to the responsibility of flesh and blood superiors, such as captains, wardens, or chiefs of police, of line officials who acted in violation of constitutional rights, and the governmental units — city, and county, but not state — that employed the line officers.

   a. For both parties, liability cannot be imposed on a vicarious basis. Merely because the superior and the city had the right to control a line officer's action, they are not required to answer in damages for the improper action of their subordinate. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978); *Boettger v. Moore*, 483 F.2d 86, 87 (9th Cir. 1973) (superior and line officer both are servants of the same master).

2. By our decision in *Rizzo v. Goode*, 423 U.S. 362 (1976), we would appear to have decided that the mere right to control without any control or direction being exercised and without any failure to supervise is not enough to support §1983 liability. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 694 n.58 (1978).

a. In *Rizzo*, the Court insisted on an "affirmative link" between the misconduct of the line officers and the acts of superiors. An affirmative link can be shown in a variety of ways:

i. By actual control. A police commissioner in a large city may not direct line officers in day-to-day activities, but if his orders to officers lead to a violation, he would be liable. A sheriff in a smaller town does control his deputies.

ii. By personal participation in the form of direct involvement, giving orders, approval of unconstitutional policy, aiding or abetting, knowledge, or wrongdoing in one form or another. *Wanger v. Bonner*, 621 F.2d 675 (5th Cir. 1980) (sheriff promulgated policy allowing full search of premises after arrest warrant issued); *Dean v. Gladney*, 621 F.2d 1331 (5th Cir. 1980) (chain of command in illegal arrest); *Maclin v. Paulson*, 627 F.2d 83 (7th Cir. 1980) (personal participation of police chief); *McKinnon v. Patterson*, 568 F.2d 930 (2d Cir. 1977); *Wilson v. Beebe*, 612 F.2d 275 (6th Cir. 1980); *Carwile v. Ray*, 481 F. Supp. 33 (E.D. Wash. 1979).

3. A failure to supervise can occur in a variety of situations:

a. If the supervisor fails to perform an explicit statutory duty and a constitutional injury occurs, he may be liable.

i. In *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978), a sheriff was required by California law to follow set procedures in a prison honor camp. He did not do so and plaintiff was injured. The sheriff was held liable.

> A person 'subjects' another to the deprivation of a constitutional right . . . if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made. . . . The requisite causal connection can be established . . . by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.

ii. *See Clappier v. Flynn*, 605 F.2d 519 (10th Cir. 1979) (failure to operate a jail according to statutory requirements); *Madewell v. Garmon*, 484 F. Supp. 823 (E.D. Tenn. 1980); *Duckett v. Ward*, 458 F. Supp. 624 (S.D.N.Y. 1978).

b. The failure to perform a duty arising from actual knowledge can lead to liability.

i. *Baskin v. Parker*, 602 F.2d 1205 (5th Cir. 1979) (sheriff who authorized the investigation and bad search is liable); *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979) (when excessive force was used during a raid on a group of Black Panthers, the nonshooters could be liable for failing to stop the shooters); *Duchesne v. Sugarman*, 566 F.2d 817, 832 (2d Cir. 1977); *Commonwealth of Pennsylvania v. Porter*, 480 F. Supp. 686 (W.D. Pa. 1979) (mayor and police chief who received complaints about a policeman that they never investigated can be liable); *Redmond v. Baxley*, 475 F. Supp. 1111 (E.D. Mich. 1979) (warden is liable for rape when he knew of previous homosexual rapes in the prison infirmary).

c. The failure to establish reasonably adequate protective procedures when he should have known of dangers will make the superior liable.

i. *See Withers v. Levine*, 615 F.2d 158 (4th Cir. 1980); *Little v. Walker*, 552 F.2d 193 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978); *Parker v. McKeithen*, 488 F.2d 553 (5th Cir.), *cert. denied*, 419 U.S. 838 (1974); *Woodhous v. Commonwealth of Virginia*, 487 F.2d 889 (4th Cir. 1973) (attack by inmates against another prisoner).

ii. There may be a difference when conditions exist that are not corrected, as in a prison, and when action is necessary to prevent the next in a series of previous episodes, as in police brutality. *Smith v. Ambrogio*, 456 F. Supp. 1130 (D. Conn. 1978).

4. Even if local state law permits vicarious liability against a government superior for a common law tort, federal courts

need not follow it. *Baskin v. Parker*, 602 F.2d 1205 (5th Cir. 1979). *But see Mosher v. Saalfeld*, 589 F.2d 438 (9th Cir. 1978).

F. Government Liability

1. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), held that cities are "persons" for the purpose of section 1983. States, on the other hand, are not persons under section 1983. *Quern v. Jordan*, 440 U.S. 332 (1979).

   a. Counties also can be sued. *Knight v. Carlson*, 478 F. Supp. 55 (E.D. Cal. 1979).

2. Local governing bodies, therefore, can be sued directly under §1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the §1983 action against a government is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other §1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision-making channels. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690-691 (1978).

   a. Thus it is no longer necessary to assert a constitutional tort against the city, based on *Bivens* and relying on the fourteenth amendment. *Dean v. Gladney*, 621 F.2d 1331 (5th Cir. 1980); *Turpin v. Mailet*, 591 F.2d 426 (2d Cir. 1979) (en banc); *Molina v. Richardson*, 578 F.2d 846 (9th Cir. 1978).

   b. Official policy is usually determined by the chief executive or the highest official governing body. *Kingsville Indep. School Dist. v. Cooper*, 611 F.2d 1109 (5th Cir. 1980) (school district can be sued for the acts of its board of trustees, since the only way it can act is by or through this board).

i. Even if it acts legislatively, and even if individual legislators are absolutely immune, a city can be sued for executing an unconstitutional provision. *Huemmer v. Mayor and City Council of Ocean City*, 474 F. Supp. 704 (D. Md. 1979) (city can be sued for adopting an unconstitutional towing ordinance, though it can rely on a good-faith defense). *Owen v. City of Independence*, 100 S.Ct. 1398 (1980) (when the police chief is fired by the city manager, at a city council meeting a defamatory statement is made by a city councilman, a resolution is passed by the city council directing the city manager to take action against persons involved in "illegal, wrongful or gross inefficient activities," and investigative reports are disseminated, in a suit by the police chief against the city for the stigmatizing actions taken in connection with the discharge, the acts were held to be the acts of the city).

ii. A policy-maker does not act only by passing laws or issuing official administrative rules. A single act of the mayor ordering the breaking into one house can be the policy of the city, though the custom of the mayor is not necessarily city policy. *See Hoopes v. City of Chester*, 473 F. Supp. 1214 (E.D. Pa. 1979). *See generally* Schnapper, *Civil Rights Litigation After Monell*, 79 COL. L. REV. 213, 223 (1979).

c. Sometimes authority to make decisions for the city is delegated to an administrator. If he makes an unconstitutional decision, the city is liable as long as he acted within the area of delegated policymaking authority. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978) (the decision of the Assistant Deputy Administrator for Personal Management of the Department of Social Services not to permit pregnant women to work was the policy of New York City); *Tinker v. Des Moines Community School*, 393 U.S. 503 (1969) (school board liable for the acts of a principal who forbad the black arm bands of students); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 448 (2d Cir. 1980) ("Surely the mayor is the one city official whose edicts and acts represent municipal policy, especially when he joins other high ranking municipal officers in devising and successfully implementing the plan" to discredit plaintiff); *Echols v. Strickland*, 28 CRIM. L. REP. (BNA) 2097 (S.D. Tex. 1980) (sheriff acted for county).

d. Official custom may be shown by actual practices that may, or may not, conform to written requirements. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 168 (1970). If an officer acts on his own to break an established rule, his acts are not the policy of the city; but if the rule is regularly ignored, practice may show custom and the city will be liable. *Knight v. Carlson*, 478 F. Supp. 55 (E.D. Cal. 1979); *Ellis v. City of Chicago*, 478 F. Supp. 333 (N.D. Ill. 1979) (custom alleged on the basis of four acts of police breaking into plaintiffs' homes).

i. In *Turpin v. Mailet*, 619 F.2d 196, 202 (2d Cir. 1980), no official city policy was indicated in the city's failure to discipline one police officer who used excessive force in arresting the plaintiff. Allegedly, this failure led a second police officer to make a bad arrest. The plaintiff had sued the first officer and won $3,500 in damages. He had complained about the first officer at a Board of Police Commissioners meeting, but no action was taken. Nonetheless, the second arrest still was not the act of the city nor the result of official policy. "[A] policy could not ordinarily be inferred from a single incident of illegality such as a first arrest without probable cause or with excessive force. . . ."

e. A complete failure to act on the part of a city can be actionable.

> If a municipality completely fails to train its police force, or trains its officers in a reckless or grossly negligent manner so that future police misconduct is almost inevitable, the municipality exhibits a "deliberate indifference" to the resulting violations of a citizen's constitutional rights. In such a case, the municipality may fairly be termed as acquiescing in and implicitly authorizing such violations. In light of responsibility, authority, and force that police normally wield, a municipality is fairly considered to have actual or imputed knowledge of the almost inevitable consequences that arise from the nonexistent or grossly inadequate training and supervising of a police force. If the

plaintiff's injury results from the complete lack of training or grossly inadequate training of a police force, such an injury is not the result of mere negligence but the result of a deliberate and conscious indifference by the city. *Leite v. City of Providence*, 463 F. Supp. 585, 590-591 (D. R.I. 1978).

i. *See Edmonds v. Dillin*, 485 F. Supp. 722 (W.D. Ohio 1980) (the failure of a city to train officers is not actionable, but its lack of action after the police raid the homes of minority members may be actionable).

3. Suits against government officials in their official capacity are treated as suits against the governmental entity.

G. Absolute Immunity

1. Judges are absolutely immune as long as they perform judicial acts.

   a. Thus, a judge of a court of general jurisdiction who ordered sterilization of a 15-year-old girl is absolutely immune even if Indiana did not authorize his acts. *Stump v. Sparkman*, 435 U.S. 349 (1978). A Texas justice of the peace with limited criminal jurisdiction is absolutely immune even if he convicted plaintiff of a nonexistent crime. *Turner v. Raynes*, 611 F.2d 92 (5th Cir. 1980).

   b. Executive officials performing judge-like functions are also immune. *Butz v. Economou*, 438 U.S. 478 (1978); *Simons v. Bellinger*, 48 U.S.L.W. 2469 (D.C. Cir. 1980) (unauthorized practice of law committee acting as court); *Ashbrook v. Hoffman*, 617 F.2d 474 (7th Cir. 1980) (partition commissioner acting judicially in dividing property is absolutely immune).

   c. But when a judge ordered a sandwich vendor brought before him in handcuffs because the vendor sold putrid coffee, the judge was not performing a judicial act and is liable. *Zarcone v. Perry*, 572 F.2d 52 (2d Cir. 1978). So, too, when a judge initiates proceedings against a black police officer for racially improper motives and makes racial remarks to the press, he has no absolute immunity. *Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979).

d. When a judge acts in an administrative capacity, he is not absolutely immune. *Atcherson v. Siebenmann*, 605 F.2d 1058 (8th Cir. 1979). *But see Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980) (in administering court reporters, the judge is absolutely immune).

e. When judges act as legislators — *i.e.*, issuing court rules — they are absolutely immune, but they are not immune in enforcing the rules. *Supreme Court of Virginia v. Consumers Union of United States*, 100 S.Ct. 1967 (1980).

f. When a judge acts as a prosecutor by preparing complaint forms, and then acts on them as a judge, he is immune for his judicial acts but not for the prosecutorial ones. *Lopez v. Vanderwater*, 27 Crim. L. Rep. (BNA) 2188 (7th Cir. 1980).

2. Prosecutors are absolutely immune while performing prosecutorial duties — *i.e.*, initiating prosecutions, presenting cases in court, and taking appeals. *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Lee v. Willins*, 617 F.2d 320 (2d Cir. 1980); *Henzel v. Gerstein*, 608 F.2d 654 (5th Cir. 1979); *Taylor v. Kavanaugh*, 27 Crim. L. Rep. (BNA) 2467 (S.D. N.Y. 1980) (plea bargaining role).

a. If a prosecutor engages in nonprosecutorial acts — like investigating, making representations to the court, or issuing press releases on cases — he may be liable. *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980) (illegal search and slander); *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979); *Jacobson v. Rose*, 592 F.2d 515 (9th Cir. 1978) (ordering wiretap); *Helstoski v. Goldstein*, 552 F.2d 564 (3d Cir. 1977); *Briggs v. Goodwin*, 569 F.2d 10 (D.C. Cir. 1977); *Martin v. Merola*, 532 F.2d 191 (2d Cir. 1976); *Wilkinson v. Ellis*, 484 F. Supp. 1072 (E.D. Pa. 1980) (ordering the destruction of exonerating material just before trial).

3. Legislators are absolutely immune while passing laws, holding committee meetings, or acting "in a field where legislators traditionally have power to act." *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951); *Bruce v. Riddle*, 49 U.S.L.W. 2195 (4th Cir. 1980) (city council); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980) (city board of directors passing zoning amendment); *Star Distributors v. Marino*, 613 F.2d 4 (2d Cir. 1980); *Green v. DeCamp*, 612 F.2d 368 (8th Cir. 1980).

4. Governors and cabinet level executive officials are not absolutely immune. *Butz v. Economou*, 438 U.S. 478 (1978); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

    a. However, if a cabinet level official is performing essentially an adjudicative function, like acting as an administrative hearing officer to determine the issues in an adversary proceeding, he is acting as judge and is absolutely immune.

5. The President of the United States is not absolutely immune for constitutional torts committed while and as President. *Smith v. Nixon*, 606 F.2d 1183 (D.C. Cir. 1979) (illegal wiretapping ordered by President; no absolute immunity); *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *cert. granted*, 48 U.S.L.W. 3750 (1980).

6. Court-appointed lawyers under the Criminal Justice Act are not absolutely immune to a state malpractice suit. *Ferri v. Ackerman*, 100 S.Ct. 402 (1979). *See Skipper v. Brummer*, 598 F.2d 427 (5th Cir. 1979), *cert. granted*, 100 S.Ct. 659, *cert. vacated*, 100 S.Ct. 1003 (1980) (section 1983 action); *White v. Bloom*, 27 CRIM. L. REP. (BNA) 2266 (8th Cir. 1980).

7. Parole officers releasing a dangerous sexual offender are absolutely immune if state law so provides. *Martinez v. California*, 444 U.S. 217 (1980).

8. Absolute immunity for common law torts may still exist for federal officials after *Butz v. Economou*, 438 U.S. 478 (1978). *See George v. Kay*, 49 U.S.L.W. 2212 (4th Cir. 1980); *Sami v. United States*, 617 F.2d 755 (D.C. Cir. 1979).

H. The Defense of Good Faith

1. A good-faith defense involves:

    a. A conscious act by a government official;

    b. With the requisite tort intent;

    c. Who believes that what he is doing is legal.

2. The defense of good faith is at times confused with other factors in constitutional litigation:

    a. The state of mind required in any tort action; or

    b. The definition of a constitutional right that itself may involve a state of mind, like the eighth amendment right to be free from cruel and unusual punishment.

        i. These two states of mind are plaintiff's burdens to prove as part of his case.

    c. The respondeat superior problem — should a superior who knows nothing about the tort be liable for his acts in causing it or for not preventing it?

3. Good faith can be either subjective or objective. The lack of subjective good faith may be inferred from the circumstances. *Cruz v. Beto*, 603 F.2d 1178 (5th Cir. 1979) (the director of prisons violated the first and sixth amendments by punishing all the clients of one attorney by segregating them in an administrative unit and withdrawing their privileges, with the lawyer being prohibited from accepting new prisoner clients); *Jacobson v. Rose*, 592 F.2d 515 (9th Cir. 1978) (sheriff and deputy could not show good faith when they never looked at a court order for a wiretap and intercepted conversations nine days beyond the date specified, though their subordinates obeying their orders might prove good faith); *Manfredonia v. Barry*, 401 F. Supp. 702 (E.D.N.Y. 1975); *Lykken v. Vavreck*, 366 F. Supp. 585 (D. Minn. 1973).

a. If an officer acts with intent to discriminate on grounds of race, no subjective good faith is possible. *Flores v. Pierce*, 617 F.2d 1386 (9th Cir. 1980).

b. Obeying improper orders is no defense. *Zarcone v. Perry*, 572 F.2d 52 (2d Cir. 1978) (a sheriff who obeyed a judge's order to bring a coffee vendor in handcuffs was liable); *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975) (an officer who removed an offending placard upon the order of the police chief was liable).

c. *See McCray v. Burrell*, 622 F.2d 705 (4th Cir. 1980) (failure to notify psychologist about the bizarre behavior of an inmate who was placed in solitary confinement); *Hupart v. Board of Higher Education*, 420 F. Supp. 1087 (S.D.N.Y. 1976).

d. Since subjective good faith involves a question of intent, it seldom can be determined on summary judgment. *Morrison v. Jones*, 607 F.2d 1269 (9th Cir. 1979), *cert. denied*, 100 S.Ct. 1648 (1980); *Milwaukee Mobilization for Survival v. Milwaukee County Park Comm.*, 477 F. Supp. 1210 (E.D. Wisc. 1979); *Shifrin v. Wilson*, 412 F. Supp. 1282 (D.D.C. 1976).

4. Objective good faith usually involves the question whether a belief in the legality of the action was unreasonable.

a. It is necessary to determine exactly when the change in the law occurred. *Procunier v. Navarette*, 434 U.S. 555 (1978); *Foster v. Zeeko*, 540 F.2d 1310 (7th Cir. 1976); *Morales v. Hamilton*, 391 F. Supp. 85 (D. Ariz. 1975).

b. If the law is unclear, good faith can be shown. *Winsett v. McGinnes*, 617 F.2d 996 (3d Cir. 1980) (en banc) (refusal to grant work release); *Raffone v. Robinson*, 607 F.2d 1058 (2d Cir. 1979) (necessity of due process for prison transfers to administrative segregation); *Bailey v. Lally*, 481 F. Supp. 203 (D. Md. 1979) (the use of prisoners for medical experiments); *Saffron v. Wilson*, 481 F. Supp. 228 (D.D.C. 1979) (rules governing demonstrations near the

White House); *Baker v. City of Detroit*, 483 F. Supp. 919 (E.D. Mich. 1979) (law on affirmative action programs).

c. Sometimes a change in the law is foreseeable or already ordained. *Doe v. Renfrow*, 49 U.S.L.W. 2098 (7th Cir. 1980) (strip search of 13-year old female student); *Slate v. McFetridge*, 484 F.2d 1169 (7th Cir. 1973) (delay in getting a park permit); *McCormick v. Edwards*, 479 F. Supp. 295 (M.D. La. 1979) (Supreme Court decision in *Elrod v. Burns*, 427 U.S. 347 (1976), anticipated by other cases); *Meyer v. Niles Township, Ill.*, 477 F. Supp. 357 (N.D. Ill. 1979); *Seals v. Nicholl*, 378 F. Supp. 172 (N.D. Ill. 1973).

d. Advice of counsel generally is a defense. *Adler v. Lynch*, 415 F. Supp. 705 (D. Neb. 1976).

e. Reliance on a court order or decision or an open administrative ruling generally is a defense. *Trapnell v. Riggsby*, 622 F.2d 290 (7th Cir. 1980) (prison regulation against nude pictures); *Mukmuk v. Commissioner of Department of Correctional Services*, 529 F.2d 272 (2d Cir. 1975); *Laverne v. Corning*, 522 F.2d 1144 (2d Cir. 1975). But if an order is obeyed unreasonably, bad faith might be involved. *Duncan v. Barnes*, 592 F.2d 1336 (5th Cir. 1979).

f. A mistake of law generally is not a defense. *Lucero v. Donovan*, 354 F.2d 16 (9th Cir. 1965).

5. Good faith is only a defense to damages, never to an injunction. *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974).

   a. *See Paxman v. Campbell*, 612 F.2d 848 (4th Cir. 1980) (en banc) where reinstatement was ordered for two teachers who could not collect back pay or damages because of the school board's good faith.

      i. Under *Owen v. City of Independence*, 100 S.Ct. 1398 (1980), the school board could not have used the good-faith defense.

6. As an affirmative defense, generally the defendant must plead and prove good faith. *Gomez v. Toledo*, 100 S.Ct 1920 (1980). *See Jacobson v. Rose*, 592 F.2d 515 (9th Cir. 1978); *Skehan v. Board of Trustees of Bloomsburg State College*, 538 F.2d 53 (3d Cir. 1976); *McCray v. Burrell*, 516 F.2d 357 (4th Cir. 1975); *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975).

7. A governmental unit may not take advantage of the good-faith defense even if it would have been available to an individual official. *Owen v. City of Independence*, 100 S.Ct. 1398 (1980).

    a. Section 1983 is broad in language and purpose and therefore immunities should not be readily accepted as defenses. While judicial or legislative immunity was firmly rooted in the common law, municipal immunity was not. "[T]here is no tradition of immunity for municipal corporations, and neither history nor policy support a construction of §1983 that would justify . . . qualified immunity. . . ." *Id.* at 1409.

    b. The justification of discretionary function cannot apply. "[A] municipality has no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative." *Id.* at 1415.

    c. Since section 1983 was designed to protect against misuse of power by those acting under color of state law, that purpose would be defeated by a good-faith defense by a governmental entity: "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees. . . . [M]any victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense." *Id.* at 1415-1416.

    d. Section 1983 was also intended to serve as a deterrent against future constitutional deprivations. Imposing liability on a city for the acts of its officers would act as an incentive to "err on the side of protecting citizens' constitutional rights." *Id.* at 1416. Officials in a policymaking position would institute regulations to minimize the likelihood of unintentional infringements on constitutional rights.

e. It is unclear whether *Owen* applies to suits brought against the United States under the FTCA. Earlier, *Norton v. United States*, 581 F.2d 390 (4th Cir. 1978), had held that if a federal officer had a good-faith defense to a false arrest charge, the United States could rely on that defense in a suit under the FTCA.

I. Liability of Private Persons

1. Under *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), private parties acting in concert with state officials can be held liable under section 1983.

2. A person acting in concert with an official who is absolutely immune, like a prosecutor, judge, or legislator, can be held liable under section 1983. *White v. Bloom*, 621 F.2d 276 (8th Cir. 1980); *Norton v. Liddel*, 620 F.2d 1375 (10th Cir. 1980); *Fries v. Barnes*, 618 F.2d 988 (2d Cir. 1980); *Sparks v. Duval County Ranch Co.*, 604 F.2d 976 (5th Cir. 1979) (en banc), *cert. granted sub nom. Dennis v. Sparks*, 100 S.Ct. 1336 (1980) (judge accused of issuing injunction after being bribed to do so by private persons). *But see Zerilli v. Evening News Ass'n*, 628 F.2d 217 (D.C. Cir. 1980) (no liability for a newspaper that printed information allegedly obtained by illegal wiretap); *Sparkman v. McFarlin*, 601 F.2d 261 (7th Cir. 1979) (en banc).

J. Res Judicata

1. Issues that were litigated and decided in a state court against a civil rights plaintiff generally cannot be relitigated in a subsequent section 1983 action. *Dieffenbach v. Attorney General of Vermont*, 604 F.2d 187, 198 (2d Cir. 1979); *Wiggins v. Murphy*, 576 F.2d 572 (4th Cir. 1978). *See Jackson v. Hayakawa*, 605 F.2d 1121 (9th Cir. 1979); *Sylvander v. New England Home for Little Wanderers*, 584 F.2d 1103 (1st Cir.

1978); *Waste Management of Wisconsin, Inc. v. Fokakis*, 614 F.2d 138 (7th Cir. 1980). *See generally* 28 U.S.C. section 1738, dealing with full faith and credit in a federal court of any state court judgment; *Vorbeck v. Whaley*, 620 F.2d 191 (8th Cir. 1980) (suit against censure litigated in state courts); *Bergersen v. Codd*, 482 F. Supp. 223 (E.D.N.Y. 1979) (grounds for dismissing a police officer were previously raised in an Article 78 proceeding).

2. But the full force of the res judicata doctrine generally is not applied. A civil rights litigant generally is not precluded from presenting issues to the federal court that could have been presented to the state court but were not. *Tomanio v. Board of Regents of University of State of New York*, 603 F.2d 255 (2d Cir. 1979), *reversed on other grounds*, 100 S.Ct. 1790 (1980); *Abramson v. University of Hawaii*, 594 F.2d 202 (9th Cir. 1979); *New Jersey Education Ass'n v. Burke*, 579 F.2d 764, 771 (3d Cir. 1978). *But see Smouse v. General Electric*, 626 F.2d 333 (3d Cir. 1980); *Robbins v. District Court of Worth City, Iowa*, 592 F.2d 1015 (8th Cir. 1979).

3. There may be a difference if the federal civil rights plaintiff was drawn into state court litigation involuntarily or if a Title VII discrimination case is involved. *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079 (8th Cir. 1980); *Thistlethwaite v. City of New York*, 497 F.2d 339 (2d Cir. 1974). *But see Mitchell v. National Broadcasting Co.*, 553 F.2d 265 (2d Cir. 1977).

4. Since, after *Stone v. Powell*, 428 U.S. 465 (1976), federal courts are precluded from examining on federal habeas corpus fourth amendment claims raised in state criminal prosecutions, should federal courts be free to examine issues anew in section 1983 actions? See *Allen v. McCurry*, 606 F.2d 795 (8th Cir. 1979), *cert. granted*, 48 U.S.L.W. 3535 (1980); *Whitley v. Seibel*, 613 F.2d 682 (7th Cir. 1980) (probable cause determination made by a magistrate on the issuance of warrant not binding in a later section 1983 case).

5. If the issues are different in the state court, res judicata cannot be pleaded. *Hernandez v. City of Los Angeles*, 624 F.2d

935 (9th Cir. 1980) (the lawfulness of an arrest according to a state court did not determine the issue of excessive force); *Johnson v. Rogers*, 621 F.2d 300 (8th Cir. 1980) (lack of malice in a state libel action does not determine good faith in a section 1983 action for wrongful discharge).

K. Damages

1. If the plaintiff can show a constitutional violation that caused him injury, he is entitled to damages even if they are difficult to compute.

2. An abstract injury to a constitutional right entitles the plaintiff to nominal damages.

3. The basic principle in computing damages for constitutional torts is compensation. *Carey v. Piphus*, 435 U.S. 247, 254 (1978).

    a. In determining what damages are to be awarded, the courts look to an analogue in state tort law. Thus, a fourth amendment violation may be compensated by reference to damage awards for trespass, false arrest, assault, or invasion of privacy in wiretap or mail opening cases. *Birnbaum v. United States*, 588 F.2d 319 (2d Cir. 1978) ($1,000 awarded in a FTCA action for the opening of one letter by the Central Intelligance Agency by comparison with an invasion of privacy state tort).

    b. If there is no common law tort analogue, the damages must be determined on basic tort principles. "The purpose of §1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action." *Carey v. Piphus*, 435 U.S. 247, 258 (1978).

    c. Damages can be significant if an official abuses his authority. *Fielder v. Bosshard*, 590 F.2d 105 (5th Cir. 1979) ($70,000 in compensatory and $29,000 in punitive damages against a sheriff and deputies for callous treatment of a sick prisoner, leading to his death); *Zarcone v. Perry*, 572 F.2d 52 (2d Cir. 1978) ($80,000 in compensatory and $60,000 in punitive damages against a judge who ordered a coffee vendor brought to him in handcuffs); *Shore v. Mohave County*, 472 F. Supp. 1114 (D. Ariz. 1979) ($75,000 in compensatory and $25,000 in punitive damages for two bad arrests by the sheriff and imprisonment in a "tank" for a few hours on two days; a seven-year old child who was taken to a foster home also received $25,000); *Gastin v. Gibson*, 328 F. Supp. 3 (E.D. Tenn. 1969) ($10,000 in compensatory and $30,000 in punitive damages for an improper arrest and beating).

4. If an intangible constitutional right is infringed, the court should take into account provable emotional and mental distress.

   a. If the court did not allow proof of humiliation and distress, a new trial must be held on the question of damages. *Baskin v. Parker*, 602 F.2d 1205 (5th Cir. 1979).

   b. Emotional distress can be caused by the discovery of an earlier violation of constitutional rights. *Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979).

   c. [A]lthough mental and emotional distress caused by the denial of procedural due process itself is compensable under §1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused. *Carey v. Piphus*, 435 U.S. 247, 264 (1978).

5. Punitive damages can be imposed even when the compensatory damages are small or nominal. *Guzman v. Western State Bank of Devils Lake*, 540 F.2d 948, 953 (8th Cir. 1976).

   a. An award of punitive damages is proper if a government official acted in bad faith, for an improper motive, or in gross disregard of the plaintiff's constitutional rights. *Boyd v. Carroll*, 624 F.2d 730 (5th Cir. 1980) ($3,100 in actual and $8,750 in punitive damages for a false arrest); *Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979), *cert. denied*, 100

S.Ct. 1331 (1980) ($60,000 in compensatory and $200,000 in punitive damages for a racially motivated campaign to discredit a black police officer); *Vetters v. Berry*, 575 F.2d 90 (6th Cir. 1978) ($520 in compensatory and $25,000 and $10,000 punitive damages for a bad arrest and beating by a sheriff and his deputy); *Redmond v. Baxley*, 475 F. Supp. 1111 (E.D. Mich. 1979) ($130,000 in compensatory and punitive damages for failing to prevent a homosexual rape in prison); *Parker v. Shonfeld*, 409 F. Supp. 876 (N.D. Calif. 1976) ($10,000 in compensatory and $10,000 in punitive damages for a Housing Act violation).

6. Under the Civil Rights Attorneys' Fees Awards Act of 1976, attorneys' fees are awarded to the prevailing party in a section 1983 action. 42 U.S.C. §1988.

   a. Attorneys' fees should be awarded almost automatically. *Gibbs v. Town of Frisco City, Alabama, Police Dept.*, 626 F.2d 1218 (5th Cir. 1980).

   b. The plaintiff need not prevail on the merits. *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978) (counsel fees awarded if the plaintiff has succeeded "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit").

   c. Attorneys' fees may be awarded for alerting the government to a problem that is then solved administratively or if the case is settled without litigation. *Maher v. Gagne*, 100 S.Ct. 2570 (1980); *Halperin v. Department of State*, 565 F.2d 699, 706 n.11 (D.C. Cir. 1977).

   d. A party may be entitled to attorneys' fees if he succeeds in a required administrative proceeding in a state court. *New York Gaslight Club v. Carey*, 100 S.Ct. 2024 (1980).

   e. Attorneys' fees may be awarded even if the persons sued have absolute immunity to a damage suit. *Entertainment Concepts, Inc. v. Maciejewski*, 28 CRIM. L. REP. (BNA) 2142 (7th Cir. 1980); *Morrison v. Ayoob*, 49 U.S.L.W. 2098 (3d Cir. 1980) (judges).

Professor FRIEDMAN. First, the point is that you cannot get punitive damages against a municipality. That eliminates the "sky is the limit" idea. It is only compensatory damages.

Second, you do not get damages against a city or county unless there was a city or county policy. If a county police officer hits someone over the head and he should not have—uses excessive force—the county is not going to pay under 1983. There may well be a collective bargaining agreement between the officials and the county which requires them to pay. I know we have that in New York City.

It has nothing to do with 1983, and no matter what you do about that, if there is an award against the policemen and there is a collective bargaining agreement or a State law—Connecticut has a law that says that any time a policeman gets sued and has to pay, then the county is going to back him up. That has been the position of the local authorities—to back those people up—not because there is a judgment against the county but as a matter of policy, as a matter of collective bargaining, they choose to stand behind the policeman.

The *Monell* case says that a county or city does not get sued directly unless there is a policy—unless they adopt a policy—and the courts have interpreted that adopting a policy concept rather narrowly. A single act of an official is not the adopting of a policy unless it is the act of the mayor and he is the administrator of the town.

So the attorney's fees award against the county does not get triggered unless there is a judgment against the county because of its policy. That really is an important limiting principle in this whole area.

Third, there are such things as insurance. I know that in New York and Connecticut there are insurance carriers that cover the awards in these cases exactly in the same way as they cover other county awards.

Senator HATCH. I hate to point this out, but some people would say that that is why medical costs are running out of sight. What are doctors paying out in California now? Some of them—general surgeons, I guess—are paying up to $30,000 and $40,000 a year just for malpractice insurance.

Professor FRIEDMAN. I do not pretend to be an expert on insurance for county governments, but—

Senator HATCH. No, but I am saying that those are costs that have to be paid whether they are paid directly in the form of awards to plaintiffs in these suits or whether they are paid directly to the insurance company who then pays the plaintiffs.

Presumably, the insurance companies are going to make a profit, so in the end it comes out to about the same cost to govern.

Professor FRIEDMAN. The counties and cities have to take that not because of 1983 but because of false imprisonment and false arrest.

The whole idea of utilizing 1983 as the vehicle for suing a county because a policeman hit you over the head was because of *Monell*. *Owen* does not help because, as I said, false imprisonment and false arrest cases do not allow a good faith defense against the county or city—not in most of the jurisdictions that I know anything about—and so *Owen* does not really affect those cases.

Now, someone will come in and bring a 1983 case and have a pendant jurisdiction case, as they are allowed to do, raising their common law claims of false imprisonment and false arrest, and depending on which the jury returns there may or may not be an attorney's fees award.

The whole notion that the attorney's fees award has really changed this or that *Owen* has changed the way in which cities and counties do their business and have to plan for these cases—I do not really know that it is true, and not from my reading of the damage awards.

Senator HATCH. Let me say this: I have had a practice on both sides of the table, both defending cases such as these and a wide variety of others and representing plaintiffs. All I can say is that with regard to insurance there are a number of municipalities who have indicated they are no longer insurable.

I am not sure that that is because they have violated civil rights to such a degree that they are not insurable. If that is so, I do not have much sympathy for them. So I do not think it is that. I think they just cannot afford it anymore.

Second, the insurance companies are not willing to provide insurance to certain municipalities because of the nature of the constituency within the municipalities and the activism with regard to bringing certain suits like this. That may or may not be an answer, but certainly one that, I guess, you can evince.

If the *Cort* v. *Ash* test is to be used to determine enforceable statutes under section 1983, what difference would it make in the enforcement of Federal statutes if S. 584 were passed because *Cort* v. *Ash* tests would be, it seems to me, used in determining the implied rights anyway? Am I wrong on that?

Professor FRIEDMAN. No, you are right. If Congress made very clear its intention that we do not want a private cause of action under the Social Security Act, the court would certainly read it that way. As activist as they are, they must obey the governing Supreme Court way of analyzing that kind of a problem.

Senator HATCH. You have made a very intelligent and enjoyable statement. I am going to read it more carefully, and I want to read this other material that you have provided or any other materials that you provide. I am very impressed with you personally, but you and I both know the definition of judicial activism is: "To heck with what the courts have said; I am going to do whatever my viscera tells me."

That is putting it in the vernacular, but that is basically what is happening all over this country. Judges are legislating from the bench, and they are ignoring the legislation that exists.

Rightly or wrongly, sometimes people justify the ends through any means. I feel the means have to be right also in order to reach the appropriate ends.

I am interested, if you feel that there is any way that S. 584 could be an effective piece of legislation, or whether you are arguing against any aspect of change with regard to 1983, although you have indicated if we want to change 1988 you would not have violent objection to that.

Professor FRIEDMAN. If the problem about 584 is that we do not want the statutory cases to create counsel fees, then I think that is fairly easy. Then you just amend 1988 and say that counsel fees shall be awarded only in cases involving a violation of constitutional rights.

Senator HATCH. Would you recommend, if we did not have these two bills that I have filed, that we limit liability, or would you still like it to be wide open liability in the discretion of the court or jury?

Professor FRIEDMAN. But it does not happen that way. The limits on liability against counties and cities are already built into the *Facts Concerts* case—you cannot get punitive damages. In *Monell,* there has to be a policy. In *Carey,* the Supreme Court case, it has to be compensatory damages; you do not get damages because your due process was violated, but the sky is not the limit there.

You have to show in the traditional way that we have shown in tort law for the last 500 years that you really were damaged in a real way.

There are those built-in interpretations of 1983 and interpretation of what a constitutional tort is and how you compensate for it that really already limit that "sky is the limit" approach.

I think the Supreme Court in this mysterious way has already cut back. I think they understand which way the wind is blowing, and in the *Sea Clammers* case they reached out to make this point about 1983 which had not been briefed by the party below. We certainly grumbled about that one.

I think S. 584 has ramifications far beyond *Maine* v. *Thiboutot* that I think are quite serious, and I think the real danger is the one that I pointed out—it is simply going to lead local authorities to misread Federal law and not to have a corrective mechanism against them in their misreading of Federal law, and I do not think that is desirable, particularly in the Social Security Act, which is the main area for concern.

Let me just finish—because I do not want to take any more time—on the *Owen* case. In my testimony, I refer to a case that I was tangentially involved with that came out of the second circuit, a case called *Sala* v. *County of Suffolk.*

Here was a woman who had an argument with her neighbor. Her neighbor swore out a summons against her. The summons was misdirected, so there was a bench warrant for her arrest.

She voluntarily came into the police department saying, "I hear you are looking for me," and the police department had a policy of strip-searching every woman committed to the custody of the sheriff, and she went through a humiliating strip search. That was the county policy.

The officers who engaged in the strip-search had a good faith defense. They were executing county policy. No one wants to hold them liable because government employees who faithfully execute county policy should not have to reach into their own pockets for that.

Between the woman who was subject to this treatment and the government employee and the county, who should bear the loss under those circumstances? I do not think it is outrageous to say the county has to bear the loss, and the reason the county has to bear the loss is that they do have to be concerned about preserving the constitutional rights of their citizens.

That case was settled for $25,000, and that was covered by insurance. It seems to me that that is a fair result of the *Owen* case.

At the time the policy was established, there was no Supreme Court case that said strip searches are terrible—now there is, obviously—but it seems to me that counties should be concerned about protecting the civil rights and constitutional rights of their citizens, and if they err at all they should err in terms of adopting policies that do not take away the rights of their citizens, and if they do, then they should have to make the kind of payment involved in that kind of case.

To overrule *Owen* and to allow the county to have a good faith defense would be to leave people in Ms. Sala's situation with no remedy at all, and I do not think that that is a fair result under these circumstances.

Senator HATCH. Thank you.

Let me ask you this: When a local government violates an individual's constitutional rights where it neither knew nor should have known it was doing so, in what way is the lack of a good faith defense a deterrent for constitutional offenses?

Professor FRIEDMAN. Take the case I just mentioned. If a county adopts a policy—a strip-search policy or something of that kind—and they have *Owen* in mind so that a good faith defense is not going to be available if this turns out to be unconstitutional, they are going to be extremely concerned about the adoption of that policy. They are going to send their county lawyer back to make sure that this policy does not affect the rights. They are going to issue regulations and look them over with a fine-tooth comb to make sure that they comport with what the constitutional rights of their citizens should be.

In that sense, it acts as a deterrent. They are not just going to look at the decided cases; they are going to see what the implications of those decided cases are, and they are going to make sure that their employees do not violate constitutional rights.

Once the policy is adopted and the officials implement that policy, the lower level officials are going to be immune. Those people are not going to have to pay.

So it seems to me that we want some incentive, as the Supreme Court said in *Owen*, to make sure that constitutional rights are protected and that policies that violate those constitutional rights are not established.

Senator HATCH. Professor Friedman, your argument against S. 584 seems to assume that Congress, when it enacts statutes which have no express cause of action, intends that those statutes be enforceable by individuals in Federal or State courts. If that is the case, why, in your opinion, does Congress go to the trouble of providing explicitly for such enforcement in certain statutes?

Professor FRIEDMAN. I do not assume that at all. If they have a self-enforcing mechanism—the kind of mechanism in the *Sea Clammers* case where there were citizens' suits provided for in other situations—then it seems to me, as the Supreme Court has just told us, there is no other private cause of action, other than that provided for in the statute.

As I said, it seems to me that, of the list of statutes that we are looking at, it is the Social Security Act uniquely—and maybe there are one or two others in that long list by Justice Powell—that seems to provide for a private cause of action.

Of the 20 others, none of them—maybe one of them—has either a self-enforcement mechanism—which is the first part of the test—or does not seem to create enforceable damage suits or injunctive rights in favor of a particular class of people.

That is why the Social Security Act is unique. It says to some people: "You are entitled to money, and if the State authorities take it away from you, you should have some relief possible." I do not think those other acts create the same kind of mechanism.

Senator HATCH. Thank you, Professor Friedman. We appreciate your enlightening remarks and the efforts you have put forth in your statement.

Professor FRIEDMAN. And my statement may be submitted for the record?

Senator HATCH. Certainly. The statements of all witnesses will be incorporated in the record.

Professor FRIEDMAN. Thank you.

Senator HATCH. Without objection, your statement will be included in the record at this point.

[Material supplied:]

PREPARED STATEMENT OF PROF. LEON FRIEDMAN

My name is Leon Friedman and I welcome the opportunity to testify before this committee on S.584 and S.585 on behalf of the American Civil Liberties Union.

The proposed bills would overrule two Supreme Court decisions dealing with the basic federal civil rights statute, 42 U.S.C. §1983. The first would overrule Maine v. Thiboutot, 448 U.S. 1 (1980) a Supreme Court decision handed down last year which held that Section 1983 provided a judicial remedy against any person acting under color of state law who deprived another person of any right, privilege or immunity secured by the Constitution "and laws" of the United States. The Supreme Court held that the phrase " and laws" meant what it said and that rights secured or protected by any federal law could be vindicated in federal court by a Section 1983 remedy. S.584 would overrule that decision by eliminating the words "and laws" in Section 1983 and substituting "and by any law providing for equal rights." Thus the bill would eliminate from Section 1983 all cases dealing with violations of the Social Security Act by state officials or other federal programs despite any violations of those laws by the state officers administering them.

The second bill S.585 would overrule Owen v. City of Independence, 443 U.S. 622 (1980). In that case the Supreme Court held that municipalities could not assert a good faith defense in a Section 1983 suit brought by a victim of unconstitutional actions by governmental officials. The bill would permit a city or county to claim that it had a good faith belief in the legality of its actions and therefore did not have to pay money damages to the victim.

It is our belief that both of these bills are unnecessary, unwise and probably will not accomplish the purposes set out for them. Furthermore they proceed from an assumption about the Supreme Court's interpretation of Section 1983 which is not borne out by the facts. I would like to address the latter point first.

When Senator Hatch introduced the two bills in question on February 26, 1981 he made the following comments about Section 1983: "I am in strong agreement with the intent of these laws -- to guarantee to every American the rights secured by the Constitution and laws providing for equal rights. Indeed I feel one of our most sacred obligations is to insure the constitutional rights of all our citizens." Cong. Rec. S.1625 (daily ed. Feb . 26, 1981). He also said that the Supreme Court had "significantly broadened the interpretation of Section 1983 in ways that have little or nothing to do with anyone's constitutional rights." Ibid) The implication behind the statement was that in Thiboutot, Owens and elsewhere as well the Supreme Court had greatly expanded the reach of Section 1983.

From our perspective the exact opposite is true. Even before the two key decisions last week, Middlesex County Sewage Authority v. National Sea Clammers Association, 49 LW 4783 (June 25, 1981) and City of Newport v. Fact Concerts, Inc., 49 LW 4860 (June 26, 1981), about which I will talk in greater detail, the Supreme Court has put sharp limitations on the Section 1983 remedy. I list only a few of their limiting decisions:

1. Quern v. Jordan, 440 U.S. 332 (1979) holding that states could not be sued for damages in a Section 1983 action because of the limitations of the 11th Amendment.
2. Allen v. McCurry, 101 S.Ct. 411 (1980) holding that the doctrine of res judicata applies to all state court decisions later challenged in a Section 1983 action even if the plaintiff in the federal action was an involuntary defendant in state court.

3. Parratt v. Taylor, 49 LW 4509 (1981) in which the Supreme Court said that negligent loss of inmate property by prison officials was not cognizable in Section 1983 if the state had an adequate judicial or administrative remedy to cover the loss. This extends the principle of the earlier case of Ingraham v. Wright. U.S. (1976) on state remedies supplying due process of law and thus precluding Section 1983 relief.

4. Pennhurst State School and Hospital v. Halderman, 49 LW 4363 (April 20, 1981) in which the Supreme Court held that the Developmentally Disabled Assistance and Bill of Rights Act (42 U.S.C. §6010) does not create any substantive right to appropriate treatment in the least restrictive environment.

5. Moore v. Sims, 442 U.S. 415 (1979) extending the principle of Younger v. Harris, 401 U.S. 37 (1971) and broadly requiring abstention by federal courts once a state court proceeding has begun involving the same issues -- even if the state court action was commenced later. In tandem with the res judicata principle established in Allen v. McCurry, the Younger line of cases may preclude federal court review of constitutional violations at any time except on direct review by the Supreme Court from state actions.

6. Board of Regents v. Tomanio, 446 U.S. 478 (1979) holding that state statute of limitation rules applied to all Section 1983 actions brought in federal court.

In short the Supreme Court has not expanded the Section 1983 remedy to any significant degree in recent years. On the contrary, aside from Monell v. Board of Social Services, 436 U. S. 658 (1978) and the two cases that prompted the proposed legislation, the Supreme Court has been extremely solicitous of state and local governments and their employees in Section 1983 cases. If any reconsideration of Section 1983 is needed, we believe the type of review suggested by Senator Mathias in S. 990 is more appropriate. Senator Mathias' bill would allow states as well as cities and counties to be sued, eliminate exhaustion requirements in Section 1983 cases, define the liability of government entities under Monell, establish a uniform statute of limitations and limit the application of Younger. If this Administration believes that government has the potential for overriding the rights of citizens and that bureaucrats can and often do violate federal law that set limits on their actions, the logical answer to those problems is an effective and vigorous judicial remedy for the victims of that abuse. We have an effective vehicle for doing so in Section 1983. It should be expanded and made to do its designed function, rather than being restricted and cramped by artificial limitations.

S.584

Turning to the specific bills before this Committee, it is our view that S.584 is unnecessary, unwise, will not accomplish its designed purpose and is far too broad to meet the problem which apparently prompted its introduction.

A. S.584 is Unnecessary:

The principle which was established by Maine v. Thiboutot, was that persons who were deprived of a right secured by federal law should be able to utilize a Section 1983 remedy to correct that injury. The Supreme Court having given with one hand has now taken away with the other hand. Last week in the Sea Clammers case (Middlesex County Sewage Authority v.

National Sea Clammers Association, 49 LW 4783 (June 25, 1981) the Supreme Court has put a significant limitation on that ruling, a limitation which this Committee should consider removing. The Court held in that case that various federal laws dealing with water pollution did not provide a damages remedy in favor of persons injured by ocean dumping of sewage and other waste by various government entities. The Court concluded that the remedies already provided for in the acts, allowing injunctive actions by government or private citizens in specified situations, were the exclusive remedies for violations of the laws.

The Court then turned to the possibility of a cause of action under Section 1983 although the point had not been raised by any of the parties. Justice Powell's opinion noted that a new test was to be established in Thiboutot-type actions:

> The claim brought here arguably falls within the scope of Maine v. Thiboutot because it involves a suit by a private party claiming that a federal statute has been violated under color of state law causing an injury. The Court, however, has recognized two exceptions to the application of §1983 to statutory violations. In Pennhurst State School and Hospital v. Halderman, ___U.S.___ (1981), we remanded certain claims for a determination (i) whether Congress had foreclosed private enforcement of that statute in the enactment itself, and (ii) whether the statute at issue there was the kind that created enforceable "rights" under §1983. Id., at___. In the present case, because we find that Congress foreclosed a §1983 remedy under these Acts, we need not reach the second question whether these Acts created "rights, privileges, or immunities" with the meaning of §1983. 49 LW at 4788-89.

The Sea Clammers case did not meet this test:

> As discussed above, the FWPCA and MPRSA do provide quite comprehensive enforcement mechanisms. It is hard to believe that Congress intended to preserve the §1983 right of action when it created so many specific statutory remedies including the two citizen-suit provisions. See Chesapeake Bay Foundation v. Virginia State Water Control Board, 501 F. Supp. 821 (ED Va. 1980) (rejecting a §1983 action under the FWPCA against the Chairman of a State Water Board, with reasoning based on the comprehensiveness of the remedies provided and the federalism concerns raised). We therefore conclude that the

> existence of these express remedies demonstrates not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under §1983. Ibid.

In short Justice Powell answered his own concern, expressed in his dissenting opinion in Thiboutot, that the broad range of federal regulatory laws would provide the basis for an explosion of Section 1983 cases brought by persons claiming to be injured by actions of state government officials who violated the laws in question. Senator Hatch also relied heavily on this issue in his statement introducing S.584. Now it appears that danger will not arise. If the regulatory laws provide for other sanctions or remedies and if the statute did not appear to create enforceable rights under Section 1983, that remedy is not available. It is no longer true that any "disgruntled citizen feeling that an official deprived him or her of some benefit under a program provided for by federal law, may sue that official for damages under Section 1983," as Senator Hatch claimed. Cong. Rec. S.1625-26 (daily ed. Feb. 26, 1981). Few of the laws cited by Justice Powell and Senator Hatch would appear to meet the new two-fold test of Sea Clammers. The proposed legislation has thus been made unnecessary.

B. S. 584 is Unwise.

Even if the Sea Clammers case had not been decided, and Thiboutot were still good law, S. 584 is simply not a desirable piece of legislation. The apparent theory behind the law is that we do not want the federal or state courts clogged with meritless litigation brought by any "disgruntled citizen" who claims to have lost a right guaranteed him by a federal statute. Thus, Section 1983 cases should be restricted only to violations of constitutional rights or rights protected by federal laws providing for equal rights.

But S. 584 would also shut off many federal claims which are clearly meritorious and noncontroversial. A typical case which would be overturned by S. 584 was decided by the Supreme

Court in 1979, Miller v. Youakim, 440 U.S. 125 (1979). In that case, the state of Illinois had administered its foster care program under the Social Security Act in a manner that distinguished between children who resided with their relatives and those who did not. The latter, who were placed in foster care with non-relatives received the full amount of the program provided for by Congress under the Act. The former, who were taken from their parents and placed in foster care with one of their relatives did not get the full amount. A challenge to this interpretation of the foster care program was brought in federal court under Section 1983. That challenge was upheld by every federal judge who heard the merits of the case, including all eight members of the United States Supreme Court who participated. They all decided that the interpretation of the Social Security Act by the Illinois authorities was inconsistent with the purpose and meaning of federal law.

The effect of S. 584 would be to deny to victims of such a misinterpretation of federal law any federal forum in which to correct the error. Why is it desirable for the Illinois authorities to persist in their erroneous interpretation of the Social Security Act and to deny to foster care children the correct amounts of money which Congress had set aside for them? It may well be that state law and the state courts would not provide an effective remedy for such a misinterpretation or would grant broad immunity against suit for those who have made the error. If we want government officials to obey the law and the dictates of Congress to be followed, there must be an effective remedy in federal court for those who are the victims of the illegal acts of state officials.

Miller v. Youakim is not the only example of the type of action which might be affected by the bill. In the Thiboutot case, the Supreme Court listed three other cases in which it had held that a state rule, regulation or law was in conflict with a Congressional enactment.

1. Van Lare v. Hurley, 421 U.S. 338 (1975), in which

the Court held by an 8 to 1 vote that New York State regulations reducing AFDC payments to qualified recipients if there is a non-paying lodger living in the same household was in conflict with federal law and regulations issued thereunder.

2. Townsend v. Swank, 404 U.S. 282 (971) in which the Supreme Court held 7 to 0 that an Illinois law denying AFDC payments to qualified recipients who attended college was in conflict with the Congressional amendments to the Social Security Act which explicitly extended payments to an older age group (18 to 20 year olds) without regard to their education status. States could chose not to participate in the extended program, but if they did, they must conform to the federal standard which did not disqualify college students.

3. King v. Smith, 392 U.S. 309 (1968) in which the Supreme Court held 9 to 0 that the Alabama "substitute father" rule which denied AFDC payments to children of a mother who "cohabits" inside or outside her home with any single or married man was in conflict with the requirements of the Social Security Act.

4. In Maine v. Thiboutot, itself, the Supreme Court held that the Maine authorities were incorrect in refusing to give the plaintiff any allowance under the Social Security Act for payments he made to five step-children that he was legally obligated to support. The Maine officials would give him credit only for payments made to three children who were his, but not for the five children of his new marrriage.

The lower federal courts have faced similar challenges to state interpretations of the Social Security law. Typical are the following examples:

5. Nolan v. de Baca, 603 F.2d 810 (10th Cir. 1979). The Court of Appeals held that New Mexico officials were wrong in attributing half of the community property of a nonadoptive stepparent who did not contribute to his stepchildren's needs in calculating AFDC payments. Governing

federal regulations required that only the income of a stepparent who is legally obligated to support the child must be considered.

6. Finberg v. Sullivan, 634 F.2d 51 (3d Cir. 1980) holding that Pennsylvania's post-judgment garnishment proceedings were in conflict with the exemption provisions of the Social Security Act since they provided for significant restrictions on the liquidity of such payments.

7. Davis v. Smith, 607 F.2d 535 (2d Cir. 1978) declared invalid New York regulations in conflict with the Social Security Act since they automatically denied emergency assistance to individuals threatened with utility shut-offs due to nonpayment.

8. Page v. Preisser, 585 F.2d 336 (8th Cir. 1978) held invalid an Iowa regulation which did not provide an AFDC recipient with complete access to his file before he was denied benefits contrary to the requirements of federal regulations.

See also Hayes v. City University of New York, 503 F.Supp. 946 (S.D.N.Y. 1980); Kanda v. Chang, 475 F.Supp. 368 (D. Hawaii 1979); Brown v. Stanton, 48 L.W. 2545 (7th Cir. January 30, 1980).

In every one of these cases, the state rule or law was held to be in conflict with federal law. I can think of no reason whatsoever why we would want state officials to continue to violate federal law. The Section 1983 remedy has been found to be the most efficient and effective way to afford relief against such violations. There is simply no reason to cut off that remedy and to allow state officers to persist in an erroneous interpretation of federal law.

C. S. 584 Will Not Work.

Perhaps the strongest condemnation of the proposed bill that we can make is that it probably will not accomplish the goal set out for it. A little background on federal practice is necessary to understand this point.

In order to bring an action in federal court, there must be both jurisdiction and a cause of action. Since federal courts are courts of limited jurisdiction, there must be specific statutory authority creating jurisdiction and either another statute (or the Constitution itself) to provide the cause of action.

To the extent that the underlying cause of action may be based on the Supremacy Clause itself and becomes actionable under Bivens, then no amount of amendment by Congress could eliminate that cause of action. The lower federal courts and the Supreme Court have applied constitutional causes of action in a number of situations when Congress has either not provided for or explicitly denied a statutory cause of action. I refer to Davis v. Passman, 442 U.S. 228 (1979) in which the Supreme Court found a Fifth Amendment cause of action in favor of a legislative aide complaining about sex discrimination although Congress had excluded itself from the reach of Title VII. More to the point, when the Supreme Court had held that municipalities were not "persons" within the terms of Section 1983 (before it reversed itself in Monell) the lower federal courts found an implied constitutional cause of action against cities based on the Fourteenth Amendment. See Turpin v. Maillet, 579 F.2d 152 (2d Cir. 1978) (en banc). When Monell was decided, this position was reversed, 591 F.2d 426 (2d Cir. 1979) (en banc).

None of these issues are settled. But there are many ambiguities in this situation which raise very serious implications for Section 1983 cases generally. The bill of course would not only try to eliminate Section 1983 cases in federal court but would do so in state court as well. The bill is not merely dealing with jurisdiction but with the underlying cause of action also. Nor does it only deal with damage actions but would affect suits for injunctions and declaratory actions also.

In the face of all these ambiguities and uncertainties, and with the Supreme Court cutting back on Thiboutot in Sea Clammers, S. 584 is simply not necessary or desirable now.

D. S. 584 Is Dangerously Broad.

As noted above, S. 584 would cover not only damage suits but injunctive actions as well. Thus it is designed to eliminate even mandamus-type actions where the only relief sought is to compel an official to do his duty without any money being paid over. Surely there is no need for such a broad sweeping provision.

Furthermore, the bill would bar counsel fees in causes of action under Section 1983. Even if the courts find a constitutional cause of action, the Federal Counsel Fees Act (42 U.S.C. 1988) is tied only to an action under Sections 1981 to 1985 and not to a constitutional claim. Thus the bill would without doubt eliminate counsel fees in many Section 1983 cases.

If that is the real purpose of the law, then the problem should be attacked directly. If Congress feels that only Section 1983 claims involving constitutional violations should give rise to attorneys fees, then the answer is to amend Section 1988, not to amend Section 1983. Amending Section 1983 involves so many other problems and has such serious implications for keeping state officials from violating federal law that it should be avoided if there is some other way to deal with Congress' real concern.

Our own view is that the courts have not been overly generous in awarding counsel fees in statutory cases. These claims amount to only a small percentage of the Section 1983 actions and there is no particular need to focus on those types of cases. But it is surely more desirable to deal with the attorneys fees issue directly rather than try to eliminate the underlying cause of action.

S. 585

The questions dealing with S. 585 are much easier to describe. The bill would overrule Owen and allow cities and counties to raise a good faith defense so that they would not be liable if they reasonably believed that their actions were not in violation of law.

Once again, the Supreme Court has acted recently to render the bill superfluous. In City of Newport v. Fact Concerts, 49 L.W. 4860 (June 26, 1981), the Supreme Court held that government entities sued under Monell may not be held liable for punitive damages. At least part of the rationale for that decision is that under Owen the municipality cannot raise a good faith defense. The Supreme Court held in Owen that removing the good faith defense will insure that government officials obey the Constitution: "The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." 48 L.W. 4397. Thus, the Court held in Fact Concerts, government officeholders already have a sufficient incentive to insure that they will keep their employees from violating the Constitution. There is no need for an additional incentive through the award of punitive damages. But if Congress takes away the Owen incentive, the Court might well conclude that punitive damages will again be necessary to make sure that the government keeps its employees in line. The Court said in Fact Concerts: "And if additional protection is needed, the compensatory damages that are available against a municipality may themselves induce the public to vote the wrongdoers out of office." 49 L.W. at 4865. In terms of actual dollars paid out, a city would be better off paying actual damages which must be proved in every case even without a good faith defense then in paying punitive damages when it is found to have acted in bad faith. The jury awarded $200,000 in the Fact Concerts case. It is a rare case that such an award is made in terms of actual damages.

There is a more fundamental problem with overruling Owen. As the Court explained in that case, there are three groups whose actions we must consider: the victim of the unconstitutional action, the government employee who committed the wrong, and the city who employed him. The good faith defense comes into play only after a constitutional violation has been found. If the government employee reasonably believed that what he was doing was legal, he should not have to reach into his own pocket to pay damages for the violation that occurred. We do not want government employees to become bankrupt when doing their job and executing policies established by their superiors. Thus between the victim and the government employee, the loss must fall on the victim. But when the government itself enters the picture, the calculations become different. When a constitutional violation occurs by action of a city, then the victim should be compensated. The cost can then be spread to all the taxpayers, and the city then has an incentive to insure that its employees will obey the law. Bringing in a good faith defense to allow the city to escape liability makes the victim bear the entire cost of a constitutional violation. Justice and reason do not call for such a result.

There are two other factors that justify this analysis. First, a city cannot be held liable at all unless its officials were executing a municipal policy. If a police officer makes an unconstitutional search or arrest, the city will not be held liable under Monell unless the officer was executing an unconstitutional policy established by the city council, the mayor or the administrator responsible for making policy. A single act by an employee is not likely to establish a city policy or custom. Thus, Owen does not come into play unless a city policy is established, a rather difficult matter of proof in many cases. See Turpin v. Maillet, 619 F.2d 23 (2d Cir. 1980).

Secondly, the city can be held liable only for actual damages. If only a technical constitutional violation occurs, only nominal damages will be awarded. The courts have been quite strict in requiring proof of actual damages in Monell-type cases, and cities have not been dipping deep into their treasuries to satisfy large damage awards by juries. Overruling Owen would place too large a burden on the victims of unconstitutional actions.

A recent case in the Second Circuit illustrates the unfairness of S. 585. In Sala v. County of Suffolk, 604 F.2d 207 (2d Cir. 1979), vacated, 48 L.W. 3677 (April 14, 1980) the County of Suffolk had established a policy of strip-searching every woman who was in the custody of the Sheriff's Department. The plaintiff had been accused of harrassing her neighbor. A summons was sent to her address. She failed to appear because the summons had been misdirected. A warrant was then issued for her arrest. When she heard the police were looking for her, she voluntarily went to the police station. Since she was then in the custody of the sheriff until the matter could be straightened out, she was subjected to a strip-search and a visual inspection of her genital and anal areas was made. She was released soon after.

She later sued for damages under Section 1983. The Second Circuit found the policy "insensitive, demeaning and stupid," 604 F.2d at 211. But since the police officers were executing a county policy they had a good faith defense for their actions. This result was proper. But the Court then went on to find that the county had a good faith defense because at the time they had established the policy, no court had flatly held it to be unconstitutional. Thus Ms. Sala could recover no damages for the humiliating treatment given her by the county. The Supreme Court vacated the judgment after Owen and remanded for a trial. The county has recently settled the case for $25,000.

This is clearly the proper result. There is no reason for people in Ms. Sala's position to walk away without compensation. If the county or city adopts a stupid, degrading, unconstitutional policy and its citizens are injured thereby, why should the municipalities be able to argue at a later time that they believed what they were doing was proper because no court had found it to be illegal? An employee is in a different position of course. But the city-employer should not be able to raise the same type of defense.

For these reasons, we strongly oppose S. 585.

Thank you for the opportunity to appear before the Subcommittee.

Senator HATCH. Our final witness will be Mr. Richard Carlisle. Mr. Carlisle is city counselor for Independence, Mo., and argued the *Owen* case before the Supreme Court.

Mr. Carlisle was chairman of the recent Institute on Local Government Liability for the American Bar Association's Section on Urban, State, and Local Government Law.

We are pleased to have you with us today, and I hope you will have better luck before this subcommittee than you had before the Supreme Court.

Mr. CARLISLE. It was a spectacular loss—there is no doubt about it.

Senator HATCH. We all understand that.

STATEMENT OF RICHARD G. CARLISLE, CITY COUNSELOR, INDEPENDENCE, MO.

Mr. CARLISLE. Mr. Chairman, I want to thank you for your request for my testimony in these important hearings.

As you noted, I have worked on behalf of the ABA in the section 1983 field. I am planning chairman for the upcoming section 1983 program being developed at the annual meeting, and we are thinking in terms of having the Civil Rights Institute on an annual basis. As you also noted, I am also city counselor for the city of Independence.

However, I would like to make one thing clear at the beginning of my testimony. I do not appear before you today, as most of your witnesses have, on behalf of any entity as such, neither the American Bar Association, the city of Independence, nor any other city.

I say this because, since arguing the *Owen* case 18 months ago, I have lectured throughout the United States, and I have learned that my views are largely, if not exclusively, my own.

After my lecture at the recent ABA National Institute, I was accused by some members of the plaintiffs' bar of being too defense oriented, but after much the same lecture at last year's annual meeting of the National Institute of Municipal Law Officers, I was accused of being unaware of the plight of the municipal defendant.

I do not know whether this means that my views are balanced or unbalanced, but I hesitate to say that I speak on behalf of anyone but myself, and I am here simply to share my reaction to some 8 years of trying the *Owen* case and to shed some light, I hope, upon some of the complexities raised by that decision.

The diverse reaction to my views seemingly exists to almost anything that is said about section 1983. There is a reason for this: section 1983, unlike many other civil rights statutes, contains no rules governing its application.

Section 1983 merely states the broad principle that the Federal courts should provide proper remedies for deprivation of Federal rights. The courts have been left to formulate rules for the application of this principle while judicial reasoning, by its very nature, has been recognized as being incapable of producing many rules which prove adequate for dealing with a complex legal situation.

Judge-made rules in the law of contracts, for example, were so lacking that the legislatures of the various States were forced to remedy the confusion by restructing the contractual process. The legislature was in a position to do this because it was more skilled at compromise and concession of broad societal issues than the courts.

What resulted were insurance codes and uniform laws dealing with negotiable instruments, sales, stock transfers, conditional sales, and so forth.

I do not propose that section 1983 could or should be quantified to this extent. However, the legislature is the only proper body to sort out the present confusion surrounding the application of section 1983; and, therefore, it is the special province of this subcommittee to begin the process of carrying the just development of civil rights law beyond what can be accomplished solely through judicial interpretation.

Issues concerning limitation of actions, exhaustion, limits on liability, and civil diversion should be considered. Definitions are badly needed, most critically of the phrase "official policy."

Lessons can be learned from prior legislation, such as the Administrative Procedure Act, the Federal Tort Claims Act and other civil rights laws.

For example, I think it is beyond doubt that a provision similar to that present in the Federal Tort Claims Act withholding court suits until a possibility of an agreed settlement has been explored would encourage speedy justice, avoid unnecessary accumulation of attorney's fees, and lessen the caseload burden presently existing in the Federal courts.

I have in mind other specific amendments. However, it may not be the intent of this subcommittee to undertake any project beyond the scope of considering the effects of *Thiboutot* and *Owen*. I sense, however, that in today's opening remarks you may well be expanding your view beyond S. 584 and S. 585, and I commend that approach. It is badly needed.

S. 584

Section 1983, after *Maine* v. *Thiboutot,* had the potential for being expanded to provide a private cause of action for damages and other relief under a vast array of Federal statutes. The implications of such a broad extension of section 1983 were unpredictable, if not awesome. The Supreme Court's decision in *Middlesex County Sewerage Authority* v. *National Sea Clammers Association* partially restricted this potential reach of section 1983, when it recognized that sufficiently comprehensive remedies under a Federal statute can demonstrate that Congress intended to foreclose implied private actions and to supplant any remedy that otherwise would be available under section 1983.

I believe that Professor Friedman, who just testified on behalf of the American Civil Liberties Union, recognizes that S. 584 and *Sea Clammers* will accomplish similar results.

S. 584 acts merely as a legislative extension of the logic of the *Sea Clammers* case; however, *Sea Clammers* requires the courts to look to a wide variety of Federal statutes to see whether the congressional intent under each statute was to preclude the remedy of suits under section 1983. S. 584's concentration is on only one statute, section 1983 itself, and seeks to inherently limit its reach—thereby decisively avoiding the necessity for frequent exercise in statutory construction of a myriad of Federal laws regulating State officials. Seemingly, both *Sea Clammers* and S. 584 restrict the reach of section 1983 in a fashion consistent with what the Reconstruction Congress may have envisioned in 1871. Yet, it is quite likely that plaintiffs will retain their private cause's of action, notwithstanding *Sea Clammers* or S. 584—invoking section 1331 jurisdiction—and, since the dollar amount requirement of section 1331 was dropped, there remains no need to invoke section 1983 to obtain section 1343 jurisdiction. Private rights of action under the Social Security Act should continue to exist, notwithstanding S. 584, by reason of the logic of *Rosado* v. *Wyman.*

Thus, it appears that no reason exists to oppose S. 584. It should receive broad support. Opposition will come only from those who seek an award of attorney's fees for private actions under Federal statutes not relating to equal rights. Surely, however—as Professor Friedman seems to recognize—section 1988 should not provide for attorneys fees for enforcement of literally hundreds of Federal laws that have nothing to do with civil liberties or equal rights. It is unlikely that the 1976 amendments to section 1988 intended that result.

S. 585

Turning to *Owen,* time does not allow extensive exploration of its complexities.

I have attached two Law Review articles and would respectfully request that they be incorporated in the record.

Senator HATCH. Without objection, they will be inserted at this point.

[Material follows:]

The Evolution of Section 1983—Verdict In on Liability but Jury Out on Remedy[*]

Richard G. Carlisle
City Counselor, City of Independence, Missouri;
B.A., University of Kansas;
J.D., LL.M., University of Missouri-Kansas City.

ON APRIL 16, 1980, the Supreme Court of the United States, in a 5–4 decision, filed its opinion in *Owen v. City of Independence.*[1] The case gained immediate, widespread attention in the media due in large part to the fact that the majority opinion can be read (as it was by the bitterly divided minority) as imposing strict liability for "crushing damage judgments"[2] on municipalities for constitutional violations. This conclusion, however, is merely the minority's answer to the first,[3] and most obvious, question left unanswered by the majority opinion: whether or not governmental entities are indeed always strictly liable in tort for their unconstitutional policies. If such were its intent, the *Owen* case will stand unparalleled in its intrusion upon the separation of powers doctrine and will literally place federal courts in charge of every aspect of decision making at the local level. However, although such may be a prospect of the *Owen* decision, read carefully, the decision's importance may lie, not in any finding of strict liability, but as the watershed case in which the Supreme Court took the first step in sorting out the full contours of municipal liability.

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[*] As promised in the Spring 1980 issue, this comment appears as a follow-up to the author's earlier article, which was written prior to the decision in *Owen*.

[1] Owen v. City of Independence, 421 F. Supp. 1110, *aff'd in part, rev'd in part*, 560 F.2d 925, *vacated and remanded for consideration in light of* Monell, 438 U.S. 902, *modified on remand*, 589 F.2d 335, *cert. granted*, 100 S. Ct. 42 (1979), *rev'd and remanded*, 100 S. Ct. 1398 (1980).

[2] 100 S. Ct. at 1432. (Powell, J., dissenting).

[3] The scope of this article does not allow exploration of all of the questions left unanswered in *Owen*. Included among such questions are: (1) what are the limits on the use of the tort remedy to review discretionary policy decisions; (2) will the same cause of action lie to challenge a basic policy decision, such as a zoning ordinance, as would lie to challenge the outrageous conduct of a high ranking official acting within the scope of his authority; (3) will a governmental entity ultimately be held liable only for "state action" under the Fourteenth Amendment, as historically defined (*compare* L. TRIBE, AMERICAN CONSTITUTIONAL LAW at 1258 (1978)), while the individual becomes liable for the remainder of (ultra vires) conduct under color of state law, made actionable (after *Monroe*) merely by reason of the passage of the statute; (4) will a semantic struggle (over the definition of "official policy") develop between public servants and their municipal employers where each attempts to avoid Section 1983 liability by making the other liable; (5) can misconduct be simply defined as official policy to accomplish the purpose of finding entity liability; (6) have the Court's comments in *Owen* (100 S. Ct. at 1417 at n.37) about Lake Country Estates v. TRPA, 440 U.S. 391 (1979) been softened by its holdings in Supreme Court of Va. v. Consumer's Union, 100 S. Ct. 1967, 1975 at n.11; (7) does the majority's reliance on Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), at footnote 35 of the *Owen* opinion suggest that, in a proper case, it will apply the holdings of Los

As previously noted,[4] determination of the Questions Presented in *Owen*, on its unique facts, involved the complex interplay of issues in civil procedure, remedies, tort, constitutional law, administrative law, agency, and, to a lesser extent, other fields. Following the case and controversy tradition, the majority in *Owen* made no attempt to resolve these issues. Although its references to Section 1983 as a "species of tort liability" were somewhat gratuitous, if not flawed and perfunctory, the Supreme Court went no further than it had to go and held only that the City of Independence was not entitled to qualified immunity as a defense to statutory *liability* for its failure to provide the plaintiff with a

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Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) concerning good faith; (8) will broad governmental programs, negligently conceived, create liability for general and special damages; (9) will a tort remedy be available in cases such as Town of Lockport v. Citizens for Community Action, 430 U.S. 259 (1977); and, (10) does the broad definition of official policy necessarily adopted in *Owen* (*compare Developing Issues in Government Tort Liability*, 12 URB. LAW. 466, 470) mean that the Supreme Court intends to merely ask the public policy question of when the public treasury (and not the individual) *should* pay for constitutional deprivations?

These questions suggest that the second most important issue left unanswered in *Owen* may be that of defining the nature of official policy, the elements of the cause of action attacking that official policy, and the defenses suggested by that cause of action. Since the public treasury, as a practical matter, would pay for any damages awarded against a public official sued in his individual capacity unless his acts were clearly ultra vires, a broad definition of official policy which includes ad hoc conduct as well as rules of general applicability is not objectionable merely because the entity becomes liable. What is highly objectionable would be an approach which treats both types of official policy in the same way. If, under appropriate circumstances, federal courts are obligated to segregate a plaintiff's various civil rights claims and apply separate statutes of limitations relating to breach of contract, tort, and statutory liability to those claims, then there is seemingly no reason to ignore the duty of analyzing another defense, that of good faith, by applying it to certain civil rights claims creating a species of tort liability while not applying it where the cause of action does not sound in tort. *Compare* Green v. Ten Eyck, 572 F.2d 1233 (8th Cir. 1978); and Board of Regents v. Tomanio, 100 S. Ct. 1790 (1980).

[4] Carlisle, *Owen v. City of Independence: Toward Constructing a Model for Municipal Liability after Monell*, 12 URB. LAW. 292, 313 (1980) [hereinafter cited as Carlisle].

name-clearing hearing in the course of his termination from employment. In a critical part of its opinion, the majority merely rejected the availablity of this defense to the entity on the basis that it was not a true "immunity" defense—noting that the "presence or absence of good faith is simply irrelevant" when compared to immunity defenses derived by reason of sovereignty.[5]

The Court's holdings in this regard are, then, merely an extension of the concepts explored in *Carey v. Piphus*,[6] where the Supreme Court unanimously, without reference to the merits of a claimant's substantive assertions, recognized that Section 1983 created strict liability only in the sense that the right to procedural due process is absolute. Acknowledging that the application of tort rules was not altogether clear, the Court allowed nominal damages, even in the absence of actual injury (clearly a non-tort remedy), while not foreclosing the availability of a tort remedy for general and special damages to compensate actual injury if the merits of a claimant's underlying, substantive assertions were proven. Thus, the Supreme Court in *Carey* recognized that Section 1983 operates on at least two levels: first, on a level of statutory liability which is "absolute and unqualified" with "no mention . . . of any privileges, immunities, or defenses that may be asserted;"[7] and, second, on the level of an action at law for tort liability "for which the court will provide a remedy in the form of an action for damages."[8]

Judicial remedies have always been distinguished from the law of substance and procedure. Statutory liability under Section 1983 exists for "every person" who, under color of state law or custom, "subjects, or causes to be subjected, any citizen in the United States . . . to the deprivation of any rights, privileges, or immunities secured by the constitution and laws."[9] *Owen* dealt only with the city's absolute liability for violation of the plaintiff's right to procedural due process. As with *Carey*, the case did not explicitly grant Owen a tort remedy for general and special damages. Indeed, although on its face merely showing reversal, the *Owen* decision was remanded to the Eighth Circuit Court of Appeals, which, on remand, filed the following unreported opinion:

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[5] 100 S. Ct. at 1413.

[6] Carey v. Piphus, 435 U.S. 247 (1978).

[7] 100 S. Ct. at 1407.

[8] Prosser, The Law of Torts at 2 (4th ed. 1971).

[9] 42 U.S.C. § 1983 (1976).

> In *Owen v. City of Independence, Mo.*, 589 F.2d 335 (8th Cir. 1978) (*Owen II*), this court determined that appellant George D. Owen could bring an action under 42 U.S.C. § 1983 (1976) against the City of Independence as well as its officials in their official capacities because he had demonstrated that the conduct of city officials deprived him of his constitutional rights in furtherance of official policy. *See Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 (1978). This court also held, however, that the City was entitled to qualified immunity from liability based upon the good faith of its officers. The Supreme Court granted certiorari upon this latter issue and reversed, **holding that municipalities enjoy no immunity under 42 U.S.C. § 1983. *Owen v. City of Independence, Mo.*, ______U.S.______, 100 S. Ct. 1398 (1980).**
>
> In light of the Supreme Court's holding, we must reverse the judgment of the district court dismissing Owen's action. The action will be remanded to the district court for further proceedings consistent with part I of our opinion in *Owen II, supra*, 589 F.2d at 336–37, the opinion of the Supreme Court, ______U.S.______, 100 S. Ct. 1398 (1980), and parts II and III of our earlier opinion in *Owen v. City of Independence, Mo.*, 569 F.2d 925 (8th Cir. 1977) (*Owen I*). Notwithstanding our comments in part IV of *Owen I*, the district court remains free to fashion a remedy for Owen's constitutional deprivations and to award appropriate relief.
>
> Appellant Owen is awarded his costs on appeal. The district court shall have discretion to determine and award attorney's fees for all services rendered in this action.[10]

Thus, notwithstanding prior dicta by both the Supreme Court[11] and the Eighth Circuit, the vote is still out on what constitutes, under principles of congruence,[12] "appropriate relief" or a proper "remedy for Owen's constitutional violations." This of course, should come as no surprise after a study of the procedural history of this case, which reveals that the City of Independence prevailed on all issues in the district court; and, that accordingly, the case has, in actuality, been adjudged since 1973 on the issue of liability alone.

Mr. Justice Brennan's remarks in an earlier Section 1983 case are, seemingly, still relevant: "The appropriateness of any particular *remedy* in a given case depends on the circumstances of that case, and especially on the degree of culpability of the defendent."[13] Thus, *Owen* should not be read in a vacuum for any sweeping conclusion that good faith will never be available as a defense to an entity since a determination of the appropriateness of any particular remedy will be based on considerations which can treat good faith as a defense on the merits.[14]

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[10] Owen v. City of Independence, No. 76–1758 (8th Cir. July 1, 1980).

[11] 100 S. Ct. at 1406, n.12.

[12] Carlisle at 313, n.54.

[13] Adickes v. S. H. Kress & Co., 398 U.S. 144, 232 (1970) (Brennan, J., concurring in part and dissenting in part) (emphasis added).

[14] Carlisle at 309.

In essence, the Supreme Court, after a survey of the common law, held that the good faith defense was not a true immunity defense to liability which would be available to municipalities in all types of causes of action. Mr. Justice Brennan's majority opinion in *Owen* merely recognized that governmental entities have never received the benefit of good faith as an *immunity defense to liability* in cases involving street grades, nuisances, taking, breach of contract, lateral support and tort. Clearly, the majority stopped short of holding that state of mind is never a defense on the merits in an action for a tort remedy, since to do so would have created a species of absolute liability in tort, the likes of which jurisprudence has never seen.[15]

Further evidence that the majority did not intend to find strict liability in tort for general and special damages may be found in that part of its opinion which finds "particular relevance to the instant case" in "contract actions brought against a city . . . for the wrongful discharge of a municipal employee. . . ."[16] It is beyond all comprehension that the Supreme Court of the United States would search breach of contract cases, stressing their particular relevance, merely to find the absence of a good faith defense in such cases, as dispositive on the availability of that defense in an action for a tort remedy.[17]

Beyond doubt, state of mind will still be relevant when the statute operates to provide a *tort* remedy (similarly punitive damages, if available, will obviously require a showing of malice). On a case-by-case basis, a good faith defense may be recognized in some Section 1983 cases providing a remedy for various statutory violations.[18] Where, for example, federal laws suggest a good faith defense, the federal courts will not be able to amend those laws to summarily dispense with that defense merely because the plaintiff brought suit under Section 1983.[19]

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[15] The so-called rule of "absolute liability" has been seen as "not absolute at all, since both the propriety of its application in the first instance, and any defense against it, are conditioned by the limitations imposed by the fundamental standards which pervade all tort law: the conduct of a reasonably prudent man under the circumstances, and its procedural corollary that whenever there is a dispute in the evidence or uncertainty as to whether that standard is met, the question is one for the jury." 74 AM. JUR. 2d, *Torts* § 14 at 632–33.

[16] 100 S. Ct. at 1410, n.19.

[17] Carlisle at 309, n.43.

[18] Maine v. Thiboutot, 100 S. Ct. 727 (1980).

[19] *Compare* FTC v. A.E. Staley Mfg. Co., 324 U.S. 746, 759 (1945) (good faith defense under Robinson-Patman Act).

In sum, the City of Independence did not receive the good faith defense for the simple reason that, in the abstract, there is no qualified immunity to all statutory liability under Section 1983.

Moreover, *Owen* should not be read as holding that the traditional immunity defenses will be unavailable to a governmental entity in the Section 1983 context.[20] Evidence that the full range of immunity defenses will be granted to the entity, where appropriate, may be found in another recent Section 1983 case, *Supreme Court of Virginia v. Consumer's Union of the United States*,[21] where various immunity defenses to the Supreme Court of Virginia, as an entity, were allowed. Further evidence of the Supreme Court's approach to other traditional immunity issues might possibly be found if the Supreme Court decides *San Diego Gas & Electric Co. v. City of San Diego*[22] on issues involving the appropriateness of damages for inverse condemnation which were avoided in *Agins v. City of Tiburon*.[23]

Conclusion

Monell v. Department of Social Services[24] and *Owen* have called into question all of the old models for liability of governmental entities, its officers and employees. Now that government can be sued directly, the old, sometimes strained and inconsistent theories for liability of individual officers, in cases which should have been brought against the entity, can be abandoned. At least the possibility exists that the complexities of *Owen* will provide the touchstone for a strong doctrinal foundation which will allow Section 1983 to strike a "wise balance between liberty and order";[25] and, essential to the building of such a foundation is the recognition that various "species" of liability under Section 1983 exist. Under principles of congruence, various causes of action may be matched to proper proceeedings for redress. Causes of action which are unique to each particular constitutional or statutory right involved may be found. The federal courts, following the instructions of 42 U.S.C. § 1988, may refer to the "background"[26] of state law, when federal law provides no clear guidance, to find helpful analogies from tort, contract, inverse condemnation, nuisance, trespass and "policy" cases alike.

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[20] Johnson v. State of Cal., 69 Cal. 2d 782, 794, 447 P.2d 352, 361 (1968), cited with approval throughout the majority opinion in *Owen*, recognized that there are large areas of governmental activity, characterized by the term "discretionary," which are liability-immune. In deciding what is discretionary action, the California court rejected a mere semantic inquiry and, instead, took a public policy approach of whether immunity *should* be given following consideration of the extent to which governmental (as opposed to individual) liability might impair the free exercise of the activity challenged. The court also considered the importance of the activity to the public and the availablility of a remedy other than a tort suit for damages. *Compare* Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 212, 213, 223, 224 (1963); and, for an interesting intellectual endeavor, apply the concepts explored in this excellent article to the hypothetical case one might envision if a plaintiff sued today under Section 1983 seeking a tort remedy on the facts of, respectively, Euclid v. Ambler Realty Co., 272 U.S. 364 (1926); Nectow v. Cambridge, 277 U.S. 183 (1928); and, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

[21] 48 U.S.L.W. 4620 (1980).

[22] 48 U.S.L.W. 3392, *jur. postponed*, 48 U.S.L.W. 3820 (1980).

[23] 100 S. Ct. 2138 (1980).

[24] 436 U.S. 658 (1978).

Thus, Section 1983 (with its apparent emphasis on the tort action for damages as the sole remedy) presently is too simple and too young and too undeveloped. What is needed is "organized complexity" (a termed coined in another context by Lawrence K. Frank)—a process which has already begun with the *Supreme Court of Virginia* case and other cases, such as *Board of Regents v. Tomanio*,[27] which recognized that defenses to the entity do in fact exist, and that the statute does not automatically create a species of strict liability in tort merely because an entity is the defendant. However, until some taxonomic order is brought to this chameleonic statute, the lower court decisions[28] may come forward with confusing and inconsistent results (caused in part, ironically, by the strong language of the dissent's characterization of the majority decision). Such instability will result because a simplistic, tort-only approach to something possessing the awesome breadth, power and potential of Section 1983 is an insufficient model to give form and direction to a statute which draws its varying substance from nothing less than all federal laws and the Constitution itself.

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[25] Carlson v. Green, 100 S. Ct. 1468, 1479 (1980) (Rehnquist, J., dissenting), *quoting* Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (Frankfurter, J., concurring).

[26] Monroe v. Pape, 365 U.S. 167 (1961).

[27] 48 U.S.L.W. 4556 (1980) (borrowing the affirmative defense of limitations from state law). *Compare* also Gomez v. Toledo, 100 S. Ct. 1920 (1980) which begins to develop procedural rules involving burden of pleading; and Carey v. Piphus, 435 U.S. 247 (1978) dealing with damages.

[28] Germankin v. Costanzo, 626 F.2d 1132 (3d Cir. 1980) (back pay remedy, similar to Title VII equitable remedies for employment discrimination, suitable for blind teacher barred from teaching sighted students); Gorman Towers, Inc. v. Bogoslavsky 626 F.2d 607 (8th Cir. 1980) (city's board of directors absolutely immune in its official capacity from damages for legislating unconstitutional zoning ordinance); Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980) (school officials not directly involved in inflicting corporal punishment not directly nor vicariously liable for school system's general policy of excessive corporal punishment); Wanger v. Bonner, 621 F.2d 675 (5th Cir. 1980) (sheriff not directly involved in midnight search of defendant's home held liable for resulting constitutional violations caused by his adoption of policies and practices for serving arrest warrants); Lucsik v. Board of Educ. of Brunswick City School Dist., 621 F.2d 841 (2d Cir. 1980) (school board's constitutional liability ends when it becomes a litigant); Johnson v. Rogers, 621 F.2d 300 (8th Cir. 1980) (sheriff's defamation in press release of deputy required name-clearing hearing for deputy following her termination); Rubin v. O'Koren, 621 F.2d 114 (5th Cir. 1980) (pursuit of state administrative remedies does not toll statute of limitations for filing § 1983 claims); Rodriguez v. Board of Educ. of Eastchester Union Free School Dist., 620 F.2d 362 (2d Cir. 1980) (bad faith allegation unnecessary if prayer includes injunctive relief, even though money damages also requested); Heath v. Redbud Hosp. Dist., 620 F.2d 207 (9th Cir. 1980) (plaintiff's reliance solely upon respon-

Society has sought a proper balance between liberty and order since the primeval stages of human culture. The growth of civil rights has, on the whole, been a creative process which has proceeded as much from cooperation between men through the formulation of laws in the legislative chamber as with the resolution of disputes between adversaries in the courtroom. Creation of these rights has been a movement from lower to higher order, which, viewed over the span of time, reveals the rich tapestry of an immutable evolution of laws furthering social justice, from Hammurabi to Hart. Section 1983 is a relative newcomer since, for all practical purposes, only a few decades have elapsed since its emergence and only a few months have passed since a full remedy was made potentially available against governmental entities. In contrast, rights and remedies which preceded it in the general common law have existed for a far longer period of time and have attained creativity, diversity and stability not yet present on the shifting sands[29] of Section 1983 (accordingly, of course, they do not have the potential or capacity of the statute).

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deat superior barred suit against entity defendants where she failed to allege any unconstitutional action in implementation, execution or promulgation of official policy); McCullock v. Glasgow, 620 F.2d 47 (5th Cir. 1980) (plaintiff's heart attack, a consequence of the town's taking of his property without compensation, is compensable even though itself unforeseeable, if defendants should have foreseen that the taking would risk some other compensable injury); Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980) (no actual injury in demand for disclosure, pursuant to state statute, of names of members of group interfering with the operation of public schools even though statute is facially unconstitutional); Flores v. Pierce, 617 F.2d 1386 (9th Cir. 1980) (plaintiff's loss of profits, additional attorney's fees and emotional distress resulting from denial of issuance of liquor license by city officials were compensable where denial was motivated by racial or ethnic discrimination).

[29] The dune is simple, dominated by a few physical processes; it consists of a few physical constitutents, mainly sand; it contains a few inhabitants and the relations between these can also be described as simple. When the forest is examined in these terms, it is seen to be inordinately complex. The physical processes that occurred, the numbers of species, the variety of habitats and niches (which is to say the roles which were performed), could only be encompassed within the term complex.

If you multiply simplicities, the result is uniformity; the product of complexities is diversity, and so it is found in examining the respective environments. The dune is the result of the uniform behavior of sand particles, their angle of repose and the action of wind; the conspicuous

The statute is dominated by few remedies or "species": ostensibly, the tort remedy alone. As evidenced by cases such as *Owen*, the statute is in a primitive state, subject to the vicissitudes of change, tempered only by a few anchoring principles. When an individual suffers a loss of liberty and casts his eyes upon the common law, he finds a forest of alternatives, many species of liability, and numerous pathways to remedies. When an individual looks to the statute he sees simplicity struggling towards the complexity that will be necessary for the striking of a wise balance between liberty and order.

Perhaps the "swing of the pendulum . . . toward greater liability"[30] has temporarily caused an imbalance towards liberty; however, such is the stuff of evolution. An apperceptive view of traditional remedies and their proper application in the Section 1983 context can provide more balance and a higher order to these growing civil liberties than may presently exist.

To the contrary, rigid adherence to the *Monroe* paradigm of Section 1983 as solely a "species of tort liability"[31] will ultimately be destructive by reason of the fact that a system of relief will have been created with small capacity to undergo the spontaneous change required to realize the potential of the statute. For example, if only the tort remedy is available, serious question arises as to whether or not a cause of action similar to that of the plaintiff in *Town of Lockport*[32] remains.

Section 1983, by the breadth of its language, has the capacity to accommodate change by providing a variety of remedies; however, if viewed in simple terms as creating strict liability in tort for innocent deprivations of newly recognized constitutional rights, either the statute itself must undergo change, or strained limitations will evolve which will leave injured parties truly "remediless"[33] simply because the tort remedy is too harsh.

> organisms are the grasses, bent to the wind, reflecting the sunlight, a constancy of uniformity. The forest is completely otherwise—uniformities are nowhere to be found. Although there is a structure of creatures occupying different trophic layers and different levels of stratification, the variation present is a permutation of the large numbers of species, environments, roles and pathways which are, indeed, multiplications of complexities.

McHARG, DESIGN WITH NATURE at 118–19.

[30] Weeks, *Personal Liability under Federal Law: Major Developments Since* Monell, 12 URB. LAW. 263, 275 (1980).

[31] Imbler v. Pachtman, 424 U.S. 409, 417 (1976).

[32] Town of Lockport v. Citizens for Community Action, 430 U.S. 259 (1977).

[33] 100 S. Ct. at 1416.

Owen v. City of Independence: Toward Constructing a Model for Municipal Liability After *Monell*

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MONELL V. DEPARTMENT OF SOCIAL SERVICES,[1] *in holding that local governments are no longer wholly immune from suit under Section 1983, did not state "what the full contours of municipal liability under Section 1983 may be." If addressed, the Questions Presented in* Owen v. City of Independence[2] *will provide the Supreme Court with a forum to consider the substantial line-drawing problems involved in defining such contours. The author suggests that actions, such as* Owen, *seeking damages for unconstitutional conduct should be distinguished from other causes of action requesting prospective declaration as to the constitutionality of basic policy decisions; and, that when the statute operates to provide a tort remedy for damages against a governmental defendant, government should be accorded all tort defenses traditionally available to its employees as individual defendants.*

I. Introduction

Enacted as Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976) has evolved into powerful legislation which provides to any person deprived of "rights, privileges, or immunities secured by the Constitution and laws," not only a frequently utilized "constitutional" tort remedy, but a whole army of other potential remedies: the prerogative writs, injunction, "review," declaratory

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*The author has represented the City of Independence since the commencement of the *Owen* litigation in 1973, and recently briefed and argued the case before the Supreme Court. The views expressed are those of the author and are not necessarily those of the respondents in *Owen*.

[1] Monell v. Department of Social Servs., 436 U.S. 658 (1978).

[2] Owen v. City of Independence, 421 F. Supp. 1110, *aff'd in part, rev'd in part*, 560 F.2d 925, *vacated and remanded for consideration in light of Monell*, 438 U.S. 902, *modified on remand*, 589 F.2d 335, *cert. granted*, 100 S. Ct. 42 (1979). The case was argued and submitted January 8, 1980.

judgment, appeal, inverse condemnation, and various statutory actions—or, conceivably, all known proceedings for redress.[3]

First mentioned (though casually) in the *Civil Rights Cases*[4] and referred to in 1951 by the Supreme Court as "loosely and blindly drafted,"[5] Section 1983 was cited only 36 times by the Supreme Court in the first 90 years following its passage;[6] its lack of use stemming from narrow definitions of state action, of the fourteenth amendment's privileges and immunities clause, and of the statute's jurisdictional counterpart.[7] In both the Supreme Court and the lower federal courts, Section 1983 was a seldom-used shield invoking the constitutional security of the fourteenth amendment.[8] In 1961, this period of dormancy abruptly ended with the Supreme Court's emphasis of the Section 1983 tort remedy in *Monroe v. Pape*.[9]

Monroe was an action for damages against police officers of the City of Chicago who entered the plaintiff's home without warning and forced the occupants to stand naked while their house was ransacked. The plaintiff was arrested, but was released without being charged. Reversing the dismissal of this suit, the Supreme Court found that a Section 1983 cause of action was stated even though the police officers misused their authority in a manner inconsistent with state law. Thus, much of the official misconduct previously thought not to be actionable under the statute was brought within its scope.

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[3] Section 1983 expressly provides for the following remedies: ". . . an action at law, suit in equity, or other proper proceeding for redress." Thus, the means by which a constitutional right is enforced or the violation of a right is prevented, redressed or compensated, BLACK'S LAW DICTIONARY 1163 (5th ed. 1979), could be (1) by act of the party injured, the principal means being defense, recaption, distress, entry, abatement, and seizure; (2) by operation of law, as in the case of retainer and remitter; (3) by agreement between the parties, *e.g.*, by accord and satisfaction and arbitration; and, (4) by judicial remedy, *e.g.*, actions or suits brought in federal (or state) courts. Shapiro v. Columbia Union Nat'l Bank and Trust Co., 576 S.W.2d 310 (Mo. 1979), *cert. denied*, 100 S. Ct. 60 (1979); Williams v. Horvath, 16 Cal.3d 834, 548 P.2d 1125, 129 Cal. Rptr. 453 (Cal. 1976); Endress v. Brookdale, 144 N.J. Super. 109, 364 A.2d 1080 (App. Div. 1976); Martinez v. California, 48 U.S.L.W. 4076 (1980). In theory, all of these remedies are available to a Section 1983 plaintiff, subject only to a determination on a case-by-case basis as to whether they are "proper" proceedings for redress.

[4] 109 U.S. 3, 17 (1883).

[5] Stefanelli v. Minard, 342 U.S. 117, 121 (1951).

[6] T. EMERSON, C. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1447 (3d ed. 1967); and, Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952).

[7] 28 U.S.C. § 1343 (1976).

[8] *Compare* Laurence H. Tribe's Model II referred to in AMERICAN CONSTITUTIONAL LAW, Ch. 8 (1978); the Virginia Coupon Cases, particularly Carter v. Greenhow, 114 U.S. 317 (1884) where the Supreme Court held that trespass on the case for damages did not lie under Section 1983 notwithstanding a violation of Article I, Section 10 of the Constitution; Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 522 (1954).

[9] 365 U.S. 167 (1961).

Monroe also held, of course, that the City of Chicago was not a "person" under Section 1983. That holding could have had some impact in discouraging suits against local government bodies but, in large measure, merely resulted in the creation of confusing and difficult doctrines which allowed suit against public officials in their individual, and, sometimes in their official capacities, but (at least in theory) not against any governmental entity. Frequently, a controversy that was clearly between a private person and his government was transmuted into a controversy between two private individuals. By means of this convenient fiction, the courts were able to exert a significant measure of control over governmental bodies and to avoid the intolerable result that literal application of the "non-person" doctrine would have created if a plaintiff were without a remedy against the harsh and illegal policies of his government. In many of these cases, the local government body was a named party, but didn't even bother to raise the absolute immunity afforded it by *Monroe*. However, such cases created confusion when the decisions were forced to move in variant directions simply because attacks on government policy itself had to be viewed in the context of the conduct of individual officers and with the "background of tort liability" emphasized by *Monroe*.

Notwithstanding, after its decision in *Monroe* the Supreme Court "after plenary consideration . . . decided the merits of over a score of cases" involving merely one type of entity defendant—school boards.[10] Many of these school board cases invoked Section 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343 (1976), as the only basis for jurisdiction.

In *Monell v. Department of Social Services*,[11] the Supreme Court (perhaps recognizing the parallel development of Section 1983 cases against governmental entities which had no apparent "background of tort liability"), overruled *Monroe* "insofar as it holds that local governments are wholly immune from suit under Section 1983," thus remembering that the Constitution was not merely a sword to attack the misconduct of governmental employees, but also was a shield against unconstitutional governmental policies.

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[10] 436 U.S. 663 nn. 5 & 6.

[11] *Id.* at 663.

Monell's analysis of the legislative history of the Civil Rights Act of 1871 found that *Monroe* incorrectly equated that part of the debates which expressed fear that "Congress had no constitutional power to impose any *obligation* upon county and town organizations" with a limitation on the "constitutional power . . . to impose civil liability on municipalities."[12] The Court concluded, therefore, that local governing bodies can be held liable when a plaintiff alleges and proves "that official policy is responsible for a deprivation of rights protected by the Constitution."[13]

The Court in *Monell* left for the lower courts the task of developing restrictions upon theories of liability. Mr. Justice Brennan's opinion and the concurring opinions of Powell and Stevens, while renouncing the *Monroe* rule of absolute municipal immunity, left for another day difficult line-drawing problems as to "what the full contours of municipal liability under Section 1983 may be."[14]

The Questions Presented[15] in *Owen* require determination of not only the nature of defenses available to a local government entity, but the nature of a plaintiff's prima facie case; in short, the *Owen* case provides a forum to the Supreme Court to begin definition of such contours. Only with development of the theories of entity liability, and thus, with development of the varying nature of causes of action against the entity, can the defenses of governmental bodies be determined.[16]

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[12] *Id.* at 664–5 (Court's own emphasis).

[13] *Id.* at 690.

[14] *Id.* at 695 and 701. In part of the Brennan opinion, deemed by Mr. Justice Stevens to be "merely advisory and . . . not necessary to explain the Court's decision" (at 714), general guidance is given as to the direction the Supreme Court might take in future cases. Clearly, however, we know that local government bodies will be liable in *factual* situations analogous to *Monell*—or, in other words, where formally adopted regulations of general application and future effect are the "moving force of the constitutional violation" (at 694).

[15] The Questions Presented on appeal to the Supreme Court in *Owen* are:

1. When should local government bodies be afforded some form of official immunity similar to the qualified good faith immunity available to local officials in their official capacities under Scheuer v. Rhodes, 416 U.S. 232 (1974) and in their individual capacities under Wood v. Strickland, 420 U.S. 308 (1975)?
2. When can qualified good faith immunity render inappropriate the award of equitable relief, declaratory judgment, or attorneys fees?

The conduct alleged to be unconstitutional (as a deprivation of liberty) in *Owen* was that of (a) a councilman's defamatory statement about the plaintiff which was "connected in the eyes of the public" with (b) a city manager's discharge of the plaintiff. The City's charter and ordinances were silent as to plaintiff's right to a name-clearing hearing as a result of such conduct; and, none was given.

II. The Conduct Case versus the Policy Case

Owen has been in the federal courts for quite some time; perhaps because it is a "hard" case[17] which involves a complex tangle of issues: respondeat superior, definition of official policy, existence of Section 1331 jurisdiction, official capacity and entity liability, the nature of appropriate relief, the limitations of *Paul*[18] and *Rizzo*,[19] various procedural issues (presumptions, burden of proof, burden of evidence), abstention, qualified immunity, and so on. Reduced to their simplest terms, the majority decisions in *Owen*, without extensive analysis of this web of issues, found that the City of Independence was liable for the tortious misconduct of a city councilman solely because such councilman was a law maker "whose edicts or acts may fairly be said to represent official policy."[20] It is unclear whether the Eighth Circuit viewed the liability of the City for the misconduct of a policy maker as an exception to *Monell's* holdings concerning vicarious liability or not;[21] however, in any event, what is important to realize is that the *Owen* decisions involved entity liability for "official conduct," in sharp contrast to *Monell* where entity liability arose for an entirely different type of official policy (of general applicability and future effect) which had "received formal approval through the body's official decision making channels."[22] Clearly, a defamatory statement by a city councilman is official misconduct polarized in nature from the policy in *Monell* (a regulation compelling pregnant employees to take leaves of absence before they were required for medical reasons). In short, *Owen* on its facts involved a constitutional tort more closely aligned with the misconduct of the police officers in *Monroe* than with the unconstitutional regulation in *Monell.*

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[16] The Federal Rules of Civil Procedure [8(b)], and the rules of procedure of many states allow a defendant to challenge the truth of a plaintiff's allegations under a general denial. This is true not only where a defendant will implement his challenge only by cross-examining plaintiff's witnesses or otherwise attacking their credibility, but also where a defendant will offer an affirmative line of proof that is inconsistent with the plaintiff's claim and will, therefore, tend to destroy it. Thus, if a plaintiff alleges that defendant's negligent driving caused his injuries, the defendant may, under a denial, show that either he or the plaintiff was somewhere else than where the accident happened, that somebody else was the owner and driver of the car which struck plaintiff, or that the injuries resulted from an inevitable accident. However, there are many instances where it is by no means clear that a denial of plaintiff's allegations will guarantee defendant a full opportunity to offer proofs inconsistent with the plaintiff's claim. For example, denial of the falsity of a libel does not traditionally allow the defense of truth to be raised unless it is pleaded affirmatively.

The point of this brief recital is to show that permissible proofs under both a general denial and an affirmative defense are inextricably tied to the nature of a plaintiff's prima facie case; and, that the same factors which bear on what the plaintiff must plead and how the burden of proof is distributed determine what must be affirmatively pleaded. These factors include relative accessibility to the evidence, convenience (*e.g.*, economy of statement), a desire to place handicaps against a disfavored but permitted defense, and various formal tests. JAMES & HAZARD, CIVIL PROCEDURE, §§ 2.9, 4.6, 4.7, and 7.8 (2d Ed. 1977).

[17] Dworkin, *Introduction to Hard Cases*, 88 HARV. L. REV. 1057 (1975).

[18] Paul v. Davis, 424 U.S. 693 (1976).

[19] Rizzo v. Goode, 423 U.S. 362 (1976).

[20] Monell, 436 U.S. at 694.

This obvious contrast raised difficult empirical problems which had to be analyzed before the Questions Presented in *Owen* could be answered. Namely, did cases such as *Owen* and *Monroe* involve different causes of action than suggested by *Monell*? Were all Section 1983 cases to be decided with a "background of tort liability"; or, were there alternative proceedings for redress which did not involve constitutional *torts*? Does a prima facie case differ depending on whether official misconduct or official policy is challenged?

Certainly, the mainstream of litigation and comment embracing Section 1983 had developed in the image of *Monroe*. *Monroe* was the type of case, decided from time to time, which is so powerful and so original as to form a new paradigm which overshadows any other approach. Yet, as the school board cases alluded to above and cases such as *Craig v. Boren*[23] indicate, there were other proper proceedings for redress, separate and distinct from the *Monroe* tort remedy. In the shadow of the *Monroe* paradigm of the "conduct case," another model had been developing: the "policy case."[24] Different causes of action and defenses were involved in each.

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[21] Owen, 560 F.2d at 933 n.9; Owen, 589 F.2d at 337.

[22] Monell, 436 U.S. at 691. The Supreme Court held that a policy case, as defined below, against a local government body arises only when "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" is alleged to be unconstitutional. *Id.* at 690. One other way, and one other way only, that a policy case can come into existence, advises *Monell*, is through practices which are so persistent, widespread, permanent, well settled, deeply imbedded, or traditional as to rise to the level of a "custom or usage with the force of law." This type of policy case is not present on the facts of *Owen*. Other cases will, of necessity, require determinations of whether "custom or usage with the force of law" or mere usage is involved. The former is treated with the same deference as public law whereas "usage" (though occasionally a term incorrectly interchanged with "custom") is not deemed to have the force of law and has been viewed as mere conduct or repetition of acts. *Compare* Adickes v. S. H. Kress & Co., 398 U.S. 144, 167–68 (1970); Nashville C & St. L. Railway v. Browning, 310 U.S. 362, 369 (1940); *see* Reimer v. Bunbury, 30 Mich. 201, 214 (1874) (noting that the Constitution is conservatory rather than reformatory and that review of customs previously in use, regarded as necessary in government and sanctioned by usage, must be accorded deference).

Experience in administrative law allows intuitive recognition of the difference between policy itself (the *Monell* model) and conduct (the *Monroe* model) because of the traditional distinctions drawn in that field between rule making, the rule itself, and adjudication. Yet, without such experience, the influence of *Monroe* suggests that implementation or execution of policy (adjudication) and policy are one and the same thing. They are not. The *Monell* and *Monroe* models, when compared, imply that there may be "policy making," "policy itself," and "policy execution."[25]

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[23] 429 U.S. 190 (1976). *Craig* is but one of a variety of § 1983 cases (Town of Lockport v. Citizens for Community Action, 430 U.S. 259 (1977)) which do not involve "a species of tort liability." Imbler v. Pachtman, 424 U.S. 409, 417 (1976). Some cases, as with *Owen* (*see* n. 32 *infra*), challenge both policy and conduct; and, approach only the latter as a federal tort. Martinez v. California, 48 U.S.L.W. 4076 (1980).

[24] Commentators and cases alike, prior to *Monell*, had little need to draw distinctions between conduct and policy by reason of the holdings in *Monroe* concerning immunity from suit. However, a few articles appeared which tended to recognize these classifications: Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281; Note, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1227 (1977); and, most importantly, the law review article referred to in Justice Powell's concurring opinion in *Monell*, Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L.J. 1483 (1977).

[25] These administrative law distinctions are of assistance in analysis of the "substantial line drawing problems" left for determination by *Monell* as to "when execution of a government's policy or custom" can be said to inflict constitutional injury such that "government as an entity is responsible under Section 1983." 436 U.S. at 694. However, the author's brief in *Owen* accepts, for purposes of argument, the general proposition that situations may conceivably be encountered where the individual is not solely liable for "policy-making" or "policy execution." As a practical matter, cases will arise in which a plaintiff names the entity as the defendant and the entity (if only to protect the employee) does not seek dismissal. Indemnification laws or policies also exist which require municipalities to pay judgments and otherwise defend suits against their public officers.

In certain instances an individual or group of individuals by their conduct can, effectively, bind the city without policy causing the conduct. The most obvious example would be a council authorization to enter into a contract on behalf of the city. In such case, if the contract was properly entered into, individual or collective conduct of officers and employees breaching the contract would bind the city. (This is not to say, however, that traditional agency principles can be applied directly to the activities of government officials. *Monell* itself and the Restatement (Second) of Agency (1958), Scope Note at 2 show that such principles are not necessarily applicable to public entities).

As the author seeks to stress throughout this article, analysis of liability in the conduct case versus the policy case is tendered not for the purpose of saying that the individual and the individual alone, will invariably be liable for his misconduct but for the purpose of distinguishing between liability rules

Policy making can be seen as any conduct which precedes policy itself; and, policy execution can be seen as conduct which follows policy. For example, the leave of absence policy in *Monell* could be identified independently of the conduct of employees executing that policy. Even though the policy could only be implemented by employees, the regulation itself could be identified as standing alone from conduct. In fact, the regulation itself could fairly be said to be the proximate cause of any conduct. Moreover, the *Monell* regulation could be challenged by the first person subjected to its implementation; or, indeed, the regulation could be challenged even prior to implementation since mere threatened injury can provide sufficient standing to challenge an unconstitutional policy.[26] A plaintiff seeking to challenge a basic policy decision, such as that present in *Monell*, is not forced to await completion of an injury or occurrence of actual damages—in other words, a plaintiff is not forced to await conduct executing the policy. On the other hand, mere threatened injury may not provide sufficient standing to challenge unconstitutional conduct.[27]

If a policy can exist, and be challenged, without any conduct at all having put such policy into effect, one small, but logical, step brings the realization that policy can also be challenged totally without regard to the nature of any conduct which actually existed to implement a policy. Thus, the employees for the Department of Social Services, in good faith, could have executed the *Monell* regulation; yet, the regulation itself would remain subject to attack. Likewise, if the policy making conduct that preceded the policy itself was innocent the policy itself would, nevertheless, remain subject to challenge on its own merits. What this suggests is that there is such a thing as a "pure policy case" where, for whatever reason, all conduct is valid or constitutional, yet an unconstitutional policy can still be attacked.

This "pure policy case" suggests its own antithesis: the "pure

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that should apply in conduct cases versus policy cases—for distinguishing between two independent theories of Section 1983 liability. *Monell* does not define policy, thus it is impossible at this time to set forth a definitive rule which would determine in every instance that the entity is not liable for conduct (as herein defined) of its employees. However, in the majority of cases, as in *Monell*, distinctions between conduct and policy will be quite easily drawn—and, in a policy case, a formal regulation or ordinance will literally take the form of documentary evidence which can physically be placed before the court for its review.

[26] U.S. v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973).

[27] *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. at 1227; Carey v. Piphus, 435 U.S. 247 (1978).

conduct case," where policy itself is constitutional but conduct in making and executing that policy is not constitutional (being, for whatever reason, conduct susceptible of definition as a constitutional tort). Thus, under the facts of the *Owen* case, the city councilman who made a defamatory statement about plaintiff could be liable to plaintiff notwithstanding the fact that he acted in violation of official City policy which prohibited his interference in disciplinary actions. Likewise, in *Monroe* the police officers could be liable as individuals where they acted in excess of valid municipal ordinances.

III. Toward Constructing a Model

Legal training focuses on the case method and emphasizes a form of normative thinking in which specific fact situations are examined against established rules (derived from statute, procedure, and/or precedent) to make judgments concerning the existence of liability. Such established rules do not exist to define the contours of municipal liability in *Owen*. Thus, the case method is not a totally satisfactory methodology to apply in *Owen* since the Supreme Court is not bound by authorities to any greater extent than it wishes to be and because the Court explicitly left the Questions Presented in *Owen* open for another day. *Monell* and *Monroe*, although certainly suggestive of the direction the Court may take, do not present identical situations to that present in *Owen*; or, for that matter, to other cases which could confront the Court. Thus, it becomes necessary to fashion a more complete model of municipal liability so that on grounds of reason and principle, apart from the case method, doctrine can evolve which can provide shape to the amorphous structure seemingly presented by Section 1983 as it now exists.

Building upon the conceptual underpinnings of both *Monell* and *Monroe* and drawing analogies from administrative law, creation of a matrix is possible which allows the complex liability combinations of municipal and individual liability suggested by *Monell* to be broken down into component parts:

I (PURE CONDUCT CASE)
Policy making—unconstitutional
Policy itself—constitutional
Policy execution—unconstitutional

II
Policy making—unconstitutional
Policy itself—constitutional
Policy execution—constitutional

III
Policy making—constitutional
Policy itself—constitutional
Policy execution—unconstitutional

IV
Policy making—constitutional
Policy itself—constitutional
Policy execution—constitutional

V	VI
Policy making—unconstitutional	Policy making—constitutional
Policy itself—unconstitutional	Policy itself—unconstitutional
Policy execution—unconstitutional	Policy execution—unconstitutional
VII	**VIII (Pure Policy Case)**
Policy making—unconstitutional	Policy making—constitutional
Policy itself—unconstitutional	Policy itself—unconstitutional
Policy execution—constitutional	Policy execution—constitutional

Formalized definitions are necessary to make this matrix more comprehensible. Thus, in general terms, "policy making" should refer to the *conduct* of any officer or employee, regardless of rank, participating in the local government body's processes and practices for adopting, promulgating, formulating, amending, or repealing a policy. "Policy itself" should mean the whole or part of any statement, ordinance, regulation, custom or other *policy* decision of general applicability and future effect. The policies most likely encountered in a municipality are its charter, ordinances, bylaws, and other formal, written policy decisions from any officer or employee intended for more than ad hoc application on a particular set of facts.[28] "Policy execution" should relate to *conduct* of any officer or employee, regardless of rank, participating in actions which (applying the policy itself to a particular person, acting in the absence of policy, or in violation of policy) results in an order, sanction, or other final disposition or act (whether affirmative, injunctive, or declaratory in form) which allegedly deprives such person of a constitutional right.

The pure policy case and the pure conduct case must be viewed as sitting at two different poles. The entity (or its officers sued in their official capacities) should be solely liable where policy itself is unconstitutional, but no wrongful conduct in making or executing the policy is involved (model VIII). Individual officers and employees (sued in their individual capacities) should normally be solely liable,[29] on the other hand, where conduct is unconstitutional, but no unconstitutional policy is involved (model I). Models II thru VII present other liability combinations which are self-explanatory.

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[28] Those familiar with administrative law will note that this definition of policy is drawn by a comparison to the definition of "rule" in the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* (1976). Ad hoc decisions on a particular set of facts, on the other hand, relate to the Act's definitions of "order" and "adjudication"—both of which are encompassed within the definition of "policy execution" in the text of this article. While these definitions aid analysis, the detailed requirements of the Administrative Procedure Act as a whole cannot be imported into a constitutional case. Indeed, the federal Administrative Procedure Act is inapplicable to local government bodies.

A model VIII case can be decided without reference to motive and state of mind, or, in general, without regard to the nature of employee conduct (such as good faith) involved in making or executing policies. Instead, the model VIII case requires judicial review, not through a tort (even a constitutional tort) remedy but in a cause of action incorporating a limited scope of review and prospective declarations of invalidity which distinguish a policy cause of action from that present in a conduct case. Perhaps for this reason, the Supreme Court in *Lake Country Estates v. Tahoe Regional Planning Agency*[30] suggested that, conduct aside, the policy involved in that case is, standing alone, subject to judicial review.

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[29] The author has no doubt that the entity, and the entity alone, is solely liable where policy itself, as defined, is challenged in a proper case. It is an open question, as alluded to in footnote 25 above, as to when and if a municipality may be liable for policy making or policy execution as defined in the text. For example, notwithstanding *Monell's* holdings pertaining to respondeat superior, the Eighth Circuit found entity liability for the conduct of the city's highest ranking officers—even in the total absence of policy as we have defined it—on the premise that such conduct "may fairly be said to represent official policy." Owen, 589 F.2d at 337. Of course, the Eighth Circuit did not use the term "policy" as defined herein. The Eighth Circuit saw the existence of discretion abiding in a high ranking officer as being dispositive of the question of whether policy exists To the contrary, logic should dictate that the exercise of discretion is indicative of adjudication; and, therefore, of conduct, not policy. Since it is possible that the Supreme Court will, in essence, define official policy in such fashion as to include both rules and orders (though to do so would be inadvisable), respondents in *Owen* were more concerned with making apparent, two divergent causes of action involving each, than with attacking the Eighth Circuit's somewhat loose and undefined use of the term "official policy". In other words, respondents knew that they must concede the absence of a tort defense in a policy case (involving a "rule")—while making sure that the tort defense of qualified immunity was available where conduct (adjudication) was attacked as a constitutional tort. The conduct of a city's highest ranking officers will, by definition of their office, involve many instances where formal, written rules do not cause the official to act. Such rules may be totally absent; yet, affirmative conduct may result in an adjudication or acts depriving a particular person of a constitutional right. Thus, the governor in Scheuer v. Rhodes, 416 U.S. 232 (1974) could have called out the National Guard without any rule of general applicability and future effect mandating his conduct. It is the premise of the brief for respondents in *Owen*, that the qualified immunity available to local officials in their official capacities under *Scheuer* and in their individual capacities under Wood v. Strickland, 420 U.S. 308 (1975), should also exist as a defense for the entity itself if the entity can be held liable under any circumstances, for the conduct of such officials.

Scheuer must be read for the proposition that qualified immunity broadens in relation to the extent of discretion exercised in a particular case. Strict entity liability (which would result without the availability of a qualified immunity defense) for the discretionary conduct of high ranking employees is a rule which would have the absurd result of directly controverting the logic of *Scheuer*. Qualified immunity should not decrease in relation to the breadth of discretion, it should increase. In sum, "it would be anomalous to establish a greater degree of immunity for municipal officials than is given to the city itself" in a conduct case. Crowe v. Lucas, 595 F.2d 985, 989 (5th Cir. 1979). On the other hand, it is not anomalous at all to recognize a different cause of action between conduct and policy cases.

The model VIII case involving government policy only will, then, require careful and deferential consideration of the policy, its legislative history, its character, the interests affected, and a variety of factors not present when a court is asked to review wrongful conduct by isolated acts of government officials thru a constitutional tort proceeding (as in a model I case). The tort action, as an action for damages,[31] remains critically important in conduct cases; but, where conduct is not involved, and policy itself is challenged, the tort action should provide no remedy at all. Thus, plaintiffs suing under Section 1983 must be asked to frame their allegations so that causes of action differentiate between the policy case and the conduct case.[32]

IV. The Conduct Case and the Constitutional Tort

The term "constitutional tort" was apparently coined in Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond:*

> It thus appears that what is developing is a kind of 'constitutional tort.' It is not quite a private tort, yet contains tort elements; it is not a 'constitutional law,' but employs a constitutional test. Because of this interesting amalgam, serious questions arise about the measurement of the substantive right. It may well be argued that given the broad language of *Monroe* construing the already broad language of the statute, every policeman's tort and every denial of a license by a state or local board will give rise to an

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[30] 440 U.S. 391, 405 (1979) at fn. 29. *Compare* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) *and/or* Nectow v. Cambridge, 277 U.S. 183 (1928) for the proper scope of judicial review of the TRPA legislation.

[31] A tort "is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages." PROSSER, THE LAW OF TORTS at 2 (4th Ed. 1971).

[32] In passing it should be noted that one complaint, containing different counts, could challenge both conduct and policy. Thus, in a model V case, for example, individuals could be sued in a tort action for their misconduct while a separate and discrete cause of action could be stated against the entity for a prospective "declaration" as to the constitutionality of a regulation or ordinance. Indeed, in the *Owen* case, the plaintiff attacked three policies without regard to any tortious misconduct of City employees; namely, three specific sections of the City's Charter (on the grounds that these sections were vague and overbroad and violated the Equal Protection Clause). Plaintiff did not preserve these attacks, and, before the Supreme Court, only the alleged misconduct of the City's highest ranking officers (and not policy) was suggested as sufficient to create entity liability.

> action under section 1983. The question may be turned around by asking whether it would violate the tenth amendment if Congress passed *Monroe* and its police-tort descendants as a statute.[33]

In conduct cases attacking "constitutional torts" under Section 1983, a plaintiff's prima facie case has traditionally involved allegations and proof pertaining to basis of liability (state of mind), duty, proximate cause, cause in fact, and actual damages. The intricacies of pleading and proof in "conduct cases" have been fully discussed elsewhere[34]—discussion which shows a firm requirement of full proof of these elements in plaintiff's prima facie case—with special emphasis on state of mind. If a plaintiff fails to carry his burden of proof in these regards, he should not have the right to any relief, legal or equitable, and, he is not the "prevailing party" for purposes of awarding attorney fees. Further, egregious conduct that "shocks the conscience" must be present, which requires either a showing of intent, or extremely culpable negligence, as part of the basis of liability.[35]

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[33] 60 Nw. L. Rev. 277, 323–24 (1965). Shapo went on to note that the statute itself, the circumstances surrounding its passage, and logic require application of a standard bearing "an umbilical relation to the statute," which always requires that "the defendant's conduct be outrageous." "Harking to the legislative history," Shapo suggested that this standard would call for "a brutality or arbitrariness which goes beyond the garden variety of state tort action." *Compare* Baker v. McCollan, -- U.S. , 61 L. Ed. 2d 433 (1979) (Blackmun, J., concurring); *Developments in the Law—Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1220; Note, *Limiting Section 1983 Action in the Wake of Monroe v. Pape*, 82 Harv. L. Rev. 1486 (1969). This standard has, from time to time, been challenged; however, Shapo's reference to the legislative history shows that the statute was primarily intended to address misconduct differing from tort only because of a unique type of constitutional injury going beyond the types of injuries recognized in the state's own tort law. If Shapo was right *Monell* may have extended a statute which was intended to relate only to outrageous conduct, to policy itself.

[34] Little would be served here by an extended analysis of the precise relationship of this statute to such tort concepts. Nahmod, Civil Rights and Civil Liberties Litigation 59–131 (1979) admirably serves this purpose. *See also* Prosser, The Law of Torts, 4th ed. (1971); and Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 Ind. L.J. 5, 7 (1974).

[35] Cases such as Procunier v. Navarette, 434 U.S. 555 (1978) and Baker v. McCollan, U.S. , 61 L. Ed. 2d 433 (1979) have attempted to deal with the question of negligence in Section 1983 actions. One reason "that the question whether an allegation of simple negligence is sufficient to state a cause of action under Section 1983 is more illusive than it appears at first blush" may lie in the fact that conduct cases make it "necessary to establish that the official acted with a degree of intent, or extremely culpable negligence, in bringing about the events that caused the plaintiff's injury." Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 Harv. L. Rev. 922, 53–4 (1976), whereas the "degree of culpability" relevant in a policy case can be viewed without reference to tort concepts involving basis of liability. Moreover, since Section 1983 merely floats above a sea of constitutional rights and draws its substance from those rights, the degree of culpability varies in relation to the constitutional right involved.

While a conduct case will require proof of intent or gross negligence, in a policy case state of mind as a basis of liability is largely inapplicable. Instead, a plaintiff's cause of action in a policy case will not be drawn from a background of tort liability but from the background of a characteristic feature, and one of the cardinal and fundamental safeguards, of the American constitutional system: what has been called horizontal and vertical separation of powers.[36]

V. The Policy Case and the Separation of Powers Doctrine

In policy cases, deference, federalism and comity are principles arising from the fear that the power existing in every branch and level of government contained the potential for abuse, and, that in constituting government, there must be a distribution of that power in order to impose checks and balances upon its public functionaries—judge, legislator, and executive alike.

Others have explored the "Madisonian clockwork" which enables "the forces and counterforces of government to mesh as needed to execute the purposes of the nation" while checking "one another as needed to shield the individual . . . from governmental oppression and discrimination."[37] Brought down to the everyday practice of law, suffice it to say that the judicial power to declare policies void must be exercised with restraint, that the policy to be reviewed must be identified precisely (to avoid decision on abstract, hypothetical, or moot constitutional questions), that the questions of constitutional invalidity must be raised in the plaintiff's first pleadings, that a plaintiff must have a direct and personal interest in the question, that presumptions of validity require construction where possible in favor of constitutionality, and that attacks on policy which merely argue the wisdom, fairness, justice, or expediency of the policy must uniformly fail.

Courts will not substitute their judgment for that of another level or coordinate branch of government.[38] In consequence of the general presumption in favor of validity of policies and the duty of courts to resolve all doubts in favor of their validity, the rule is fixed that the party who alleges the unconstitutionality of a policy has a heavy burden in sustaining his claim. Unlike the burden of proof in conduct cases which seemingly requires proof by a mere preponderance of the evidence, the burden in policy cases should require a plaintiff to show that no rational basis, which might support the policy, exists. Presumptions of validity require proof showing unconstitutionality beyond a reasonable doubt. Certainly, the availability and scope of judicial review will vary depending upon the facts and circumstances of each case. The principle remains the same, and, as pertains to non-statutory review under principles embodied in the constitution (as opposed to procedures mandated by statutes for review of agency decisions), this presumption of validity attends judicial, legislative, and executive policies.[39]

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[36] L. TRIBE, AMERICAN CONSTITUTIONAL LAW 2 (1978) [hereinafter cited as TRIBE].

[37] *Id.* at 15. Freidrich, *Separation of Powers*, 13 ENCYCL. SOC. SCI. 663–6 (1934); Elazar, *Federalism*, 5 INT'L ENCYCL. SOC. SCI. 353, 361–65 (1968); Roch, *Distribution of Powers*, 3 INT'L ENCYCL. SOC. SCI. 300 (1968); WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 56 (1908).

[38] As TRIBE notes at 18, "it is not possible cleanly to separate federalism issues from separation-of-powers issues. . . ."

VI. It Is Not "a Tort for Government to Govern"

Tort concepts drawn from application to private persons do not adequately indicate, in many respects, how tort responsibilities of governmental agencies should be allocated in a conduct case—let alone how checks and balances on separate branches and levels of government should operate in a policy case. Public entities typically engage in a wide spectrum of activities through their policies which have no obvious private counterparts. Many governmental functions involve inherent exposure to potentially injurious consequences far in excess of the risks normally encountered in the private sector. Indeed, many of the most typical and routine duties of governmental entities (including the functions embraced by legitimate deprivations of liberty and property at the expense of private interests) involve policies which invariably cause some injury to individuals. If injury is traceable solely to policy itself and not misconduct, then government should be given "cost-free" notice and opportunity to change that policy if it is unconstitutional. Government hardly could go on if, to some extent, values incident to property and liberty could not be diminished somewhat without paying for every such change in the general law—through damages treating policy as tortious conduct, or through inverse condemnation.[40]

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[39] Pacific States Box & Basket Co. v. White, 296 U.S. 176, 185 (1935); United States v. Chemical Found., 272 U.S. 1, 14–15 (1926).

[40] In Fred F. French Investing Co., Inc. v. City of New York, 39 N.Y.2d

The limitations on an inverse condemnation action or an action for damages developed in other than the Section 1983 context, reflect procedural and substantive rules that were won, over time, after much thought and great difficulty, rules which should not be jettisoned summarily simply because a plaintiff chances suit under Section 1983. Yet, there is a natural inclination in a Section 1983 case to extend the protection of the statute (in an action at law for the award of damages) to types of monetary loss and constitutional deprivations which were not previously compensated; for example, in prior inverse condemnation cases brought under state law.

The fact that the protections of Section 1983 are developing so rapidly does not mean that prior remedies for specific types of injuries were illogically developed. Refusal to recklessly extend the reach of a Section 1983 damages action is not a denial of the worth of the plaintiff's interests, as much as it is a recognition that the term "constitutional tort" should not mean all things to all people; Section 1983 does not require compensation for all deprivations of constitutional rights through open-ended municipal liability which would treat city treasuries as a fund for mutual insurance. After all, Section 1983 requires "proper" proceedings for redress—which should suggest that modes of protection other than the damages action must be used in a policy case.

However, it seems more than remotely possible that the federal courts are on the verge of viewing policy itself as a constitutional

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587, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976) the court held that there could be no action in inverse condemnation for governmental regulations but that the remedy for private interests must be to have the regulation declared invalid as an unreasonable exercise of power. An ordinance would be considered unreasonable where it (A) "encroaches on the exercise of private property rights without substantial relation to a legitimate governmental purpose," (B) bears no reasonable relation to the ends sought to be achieved, or (C) "renders the property unsuitable for any reasonable income productive or other private use for which it is adapted and thus destroys its economic value, or all but a bare residue of its value." 350 N.E.2d at 386–7. Many governmental policies have been declared invalid using similar calculus; however, the courts have refused to view such policies as sounding either in tort or in "temporary inverse condemnation" of property and liberty rights—thereby also refusing to recognize a right to retroactive, compensatory relief.

There is a very clear distinction between inverse condemnation and tort; and between just compensation and damages. Damages are simply retroactive, monetary relief paid as a consequence of injury, not necessarily bearing any relationship to direct physical invasion of property, and are not the basis of recovery of a lawful claim for just compensation for a taking. Kirkpatrick v. City of Jacksonville, 312 So.2d 487, 489 (Fla. App. 1975). In addition, obviously there is no condemnation right, as such, abiding in a public authority to pay just compensation for a taking of constitutional rights (*e.g.*, "liberty rights")—as opposed to the constitutional right to just compensation for an appropriation of property.

tort by allowing an action at law in a policy case for full and complete recovery of all general and special damages. Certainly, there was a pre-*Monell* gloss of a "background tort of liability" which may have suggested that the statute was to create a cause of action against outrageous conduct only. With this gloss, post-*Monell* cases which clearly involve suits against the officer in his individual capacity to recover damages for his tortious misconduct will be analyzed with little confusion. Clear and justifiable immunity defenses should be readily applied in these conduct cases—even if the defendants happen to be sued in their official capacities or if the defendant is an entity. But, if a Section 1983 suit is really against policy itself, it simply cannot be treated as a tort action. If only because of the presumption of validity attending policy, the courts should hesitate to grant retroactive, monetary relief where a policy causes deprivation since it has never been the judiciary's function to stop government in its tracks by making it "a tort for government to govern."[41] In general terms, both government and individuals are free to engage in many activities that result in harm to others so long as such activities are not tortious. Traditionally, cities could promulgate a wide variety of laws, regulations and policies, not without fear of challenge, but without fear of their policy being treated as tortious conduct.

Of course, it does not follow that the making and execution of such policies will invariably involve non-tortious conduct. It is a simple matter to imagine, for example, that policy makers could fraudulently conspire to pass a policy which deprived another person of some constitutional right. Likewise, the execution of valid policy could be tortious (as with police brutality cases).

Notwithstanding, there seems to be a strange reluctance to recognize distinctions between policy and conduct cases—but distinctions there are. For example, in a policy cause of action, judicial rescue would be available from a city ordinance requiring the burning of unpopular books (since not even the judicial passivists would seriously contend that such an ordinance had a rational basis). On the other hand, should the mayor of the city break into a citizen's home without warning, ransack the house, and burn all books deemed to be objectionable, the judiciary would not deal with such misconduct by asking questions of legislative intent and rational basis, but would quickly decide that the mayor's conduct was outrageous, intentional, and tortious; thus, giving rise to a conduct cause of action.

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[41] Dalehite v. United States, 346 U.S. 15, 57 (1953) (dissenting opinion).

In short, although Section 1983 has largely been interpreted against a "background of tort liability,"[42] now that we have *Monell's* distinction between policy and conduct we must keep firmly in view that tort concepts always involve conduct and never policy itself.

VII. Defenses of the Individual Are Those of the Entity in Conduct Cases

We have seen that the plaintiff's prima facie cause of action in a conduct case involves allegations and proof pertaining to basis of liability (state of mind), duty, proximate cause, and cause in fact.[43]

The good faith defense involves both an objective and a subjective test. The subjective test requires a determination of whether or not the defendant acted without malice. The objective test requires that the defendant prove that he did not act in disregard of settled, indisputable law and that, otherwise, he also had reasonable grounds for his conduct. The qualified good faith immunity defense is, then, clearly a *defense on the merits.* It disproves the merits of plaintiff's case since the objective part of the defense relates to duty, proximate cause, and cause in fact and the subjective part of the defense relates to state of mind.[44]

The impact of treating the good faith defense as a defense on the merits in a constitutional tort case is clearly such that it should defeat liability of any defendant for any relief, either in equity or law, for the simple reason that the "threshold issue" of whether or not a deprivation of constitutional rights has occurred is not enough, standing alone, to give rise to the right for any type of relief.[45]

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[42] 365 U.S. at 187.

[43] An analysis of the conduct case relies heavily upon the fact that Section 1983 cases of this genre have a firm relationship to tort concepts. One must recognize, however, that the chameleon-like quality of Section 1983 may make that statute capable of providing causes of action which sound in breach of contract, inverse condemnation, defamation, statutory actions and so forth. Thus, if failure to provide notice and hearing prior to termination of employment is a deprivation of property sounding in breach of contract, one can argue that a "tort" defense that one breached the contract unintentionally would not defeat liability and that contract, not tort, rules of damage should apply. *Compare,* Arnett v. Kennedy, 416 U.S. 134 (1974); Lipman v. Brisbane Elem. School Dist., 55 Cal.2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (Cal. 1961).

[44] Other commentators have recognized that the good faith defense is not an immunity defense to suit. Instead, the "immunity" involves proofs which bear directly on plaintiff's cause of action—so much so that the burden of evidence shifts back and forth as both parties submit evidence touching on basis of liability, duty, proximate cause, and cause in fact. *Developments in the Law—Section 1983 and Federalism,* 90 HARV. L. REV. 1133, 1209 n.119 (1977); Procunier v. Navarette, 434 U.S. 555, 572 (1978) (Stevens, J., dissenting); *supra,* n.16.

There have been pronouncements prior to *Monell* which would indicate that the good faith defense is not a defense to equitable relief. The logical explanation for such pronouncements simply requires the realization that no one, entity or individual, has the right to continue unconstitutional conduct. In essence, the good faith defense is lost, as a factual matter, simply because a person cannot, in good faith, continue unconstitutional conduct. On the other hand, neither officer nor government[46] is, or should be, liable under Section 1983 for completed, innocent, isolated exercises of discretionary power.

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45. The availability of equitable relief in a conduct case where Section 1983 is invoked to provide a tort remedy "will depend in the first instance upon the possibility that an action for damages would lie for the wrong attacked." PROSSER, THE LAW OF TORTS 2 (4th ed. 1971). If only the "threshold issue," Baker v. McCollan, — U.S. —, 61 L. Ed. 2d 433 (1979), of some deprivation of a constitutional right sufficed, no allegations and proof pertaining to basis of liability, duty, proximate cause, and cause in fact would be necessary. No issue of what conduct was involved would be pertinent. If only because of the breadth and complexity of constitutional rights, logic dictates that every isolated violation of a constitutional right cannot be viewed as a constitutional tort. One commentator recognized that there is "not an individual constitutional right never to be injured at the hands of state officials but rather a right to live in a system which seeks to minimize such injuries" and that "some injuries to citizens emerge as background costs of living in our society." *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1228 (1977).

On the other hand, where a systematic and continuing deprivation of constitutional rights occurs, injunctive relief is also available in a policy case—but in a different cause of action from that present in a conduct case.

46. The concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity—in other words, government officers get their immunity from the entity. Thus, when the common law recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability, the rationales for the resulting qualified immunity were equally applicable to the immunity of the individual and the immunity of the government. Scheuer, 416 U.S. at 239 and 240. The rationales for official immunity cited in *Scheuer* were drawn from Jaffe, *Suits Against Governments and Officers: Damages Actions*, 77 HARV. L. REV. 209, 213, 223–24 (1963). Jaffe, as author of these rationales, saw no distinction making them applicable to individuals but not to entities and treated them as "co-terminous" as they related to governmental and individual immunity—a point called to the attention of the author by Professor Ronald Levin. However, neither the common law, policy considerations, nor, for that matter, the legislative history of Section 1983 must be exhaustively analyzed merely to determine whether a plaintiff has pleaded and proved the elements of his prima facie case. Federal purposes and interests underlie a Section 1983 cause of action which may be quite different from the purposes and interests of tort concepts which have evolved as part of the common law. Depending

Moreover, not just the good faith defense, but all defenses of the individual employee should be imputed to a governmental defendant when the statute operates to provide a tort remedy. For example, if an entity can be sued for the conduct of its legislators, it should be accorded their absolute immunity defense.[47] Thus, in *Lake Country Estates*[48] the absolute immunity afforded the TRPA legislators should be enjoyed by the entity, if the entity, under any circumstances, could be sued upon the same cause of action. The plaintiff's mere choice of the named defendants should not have the effect of making one defendant strictly liable, and another absolutely immune on the same cause of action.

In addition, there are other absolute, judicial and prosecutorial, immunities[49] which should protect, not merely the actor as an individual, but also the entity (or the actor sued in his official capacity).[50]

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on the type of remedy sought, the common law may create immunities that do not apply to an action brought under Section 1983; and, conversely, the developing law of torts clearly extends potential liability to some defendants beyond the reach of the federal statute. *Compare* Scheuer at 239; *and*, Paul v. Davis, 424 U.S. 693 (1976) (no Section 1983 action notwithstanding existence of tortious conduct under color of state law).

[47] Again, the Supreme Court in *Monell* clearly held that a local government body can be held liable only for its policy and not for the misconduct of its employees based upon a respondeat superior theory. However, the *Monell* court did not define what it means by the term "official policy." The definition of policy herein may or may not be the definition ultimately adopted by the Supreme Court, in *Owen* or in some other case. This definition was tendered in *Owen* not for the purpose of defining, for all cases, the type of policy for which an entity could be held liable—but, instead, to differentiate between causes of action involving policy of general applicability and future effect and other causes of action sounding in tort for the ad hoc adjudications of officers exercising discretionary functions.

[48] 440 U.S. 391 (1979).

[49] Pierson v. Ray, 386 U.S. 547 (1967); Stump v. Sparkman, 435 U.S. 349 (1978); and Imbler v. Pachtman, 424 U.S. 409 (1976). It should be noted in passing that legislators must act within a "traditional legislative capacity," judges must act within or in "excess of jurisdiction" but not in the "clear absence of all jurisdiction," and prosecutors must act as "advocates in the criminal process" before absolute immunity attaches. If in addition to the immune conduct of the actor, unconstitutional official policy caused that conduct or combined with the unconstitutional conduct, then the entity would be liable for its policy but not for the conduct of the actor. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION (1979) at 191–228.

[50] There is, of course, a significant difference between qualified and absolute immunity in application—primarily, because there may be no inquiry into the absolutely immune defendant's state of mind, while such an inquiry is necessitated by a qualified immunity claim. Typically, therefore, the action against an absolutely immune defendant will be dismissed on a motion setting out the defendant's status and an allegation of action within official capacity. On the other hand, the good faith defense raises evidentiary questions which cannot be decided on a motion.

VIII. Relief in the Conduct Case

A plaintiff who has carried his prima facie cause of action against an individual or governmental defendant in a conduct case may, in accordance with the principles of *Carey v. Piphu,*[51] receive appropriate relief, including damages. Although *Carey* notes that it is not altogether clear that common law tort rules provide a complete solution in a Section 1983 case and although Section 1983 says nothing on its face about damages, two kinds of actual damages are available in a conduct case: first, special damages consisting of medical expenses, lost income and the like, which are proximately caused by a defendant's conduct; and, second, general damages for pain, suffering, humiliation, embarrassment, emotional distress, and damage to reputation. Even punitive damages may be awarded.

IX. Relief in the Policy Case

Damages, as defined above, will generally be unavailable in a policy case. By definition, a conduct case will arise from some past occurrence and become actionable, when actual injury occurred. A policy case is not retrospective to past conduct but is prospective and assumes the continuation of policy. Conceivably, an individual defendant could successfully carry his burden of proving good faith immunity; but, as noted above, good faith immunity in the conduct case may not be applicable in a policy case against the entity. The two causes of action must be kept discrete since the problem of retroactive relief in a policy case, unlike the conduct case, involves the principal problem of whether a policy is void ab initio or merely voidable.[52] The effect of judicial rulings declaring policies unconstitutional raises difficult issues[53] which, for the purposes of this article, must merely be summarized to state that no principle of absolute, retroactive invalidity is justified. Monetary relief is, of course, allowed in some cases (although in the federal context such relief is normally specifically directed by Congress, as in Title VII cases allowing back pay for a period of two years—and should not be so readily available in Section 1983 cases). If and when retroactive monetary relief is available in a policy case it does not include all of the special and general damages available through the tort remedy. If retroactive, monetary relief is granted in a policy case, such relief should be through restitution and not a full damages remedy.[54]

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[51] 435 U.S. 247 (1978). *Compare* Zarcone v. Perry, 572 F.2d 52, 55 (2d Cir. 1978).

[52] The problem of retroactive relief in a policy case is not approached on the basis of considerations which are *totally* dissimilar to those involved in analyzation of whether good faith immunity is available. Cases such as Cox v. Cook, 420 U.S. 734, 736 (1975) (per curiam); Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978); and, Sala v. County of Suffolk, 604 F.2d 207 (2d Cir. 1979) can be read to show some similarity.

[53] Consult Chevron Oil Co. v. Hudson, 404 U.S. 97, 106 (1971); Daniel v. Louisiana, 420 U.S. 31 (1975); Duren v. Missouri, 99 S. Ct. 664; Rogers, *Perspectives on Prospective Overruling*, 36 U.M.K.C. L. REV. 35 (1968); Mishkin, *The Supreme Court 1964 Term Forward: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965).

X. Conclusion

Determination of the Questions Presented in *Owen* involves the complex interplay of civil procedure, remedies, tort, constitutional law, administrative law, agency, and, to a lesser extent, other fields as well. Given the difficulties of the problem, perhaps one case cannot fully dictate the approach for defining the full contours of municipal liability.[55] However, once the Supreme Court decides the

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[54] Judicial remedies must be distinguished from the law of substance and procedure; of course, in line with principles of congruence, any judicial remedy should match a plaintiff's substantive right (or, viewed in Hohfeldian terms, duty). Coercive and declaratory remedies are clearly available in a policy case. In addition, of the two money remedies, damages and restitution, the restitutionary remedy is the more appropriate. *See* DOBBS, THE LAW OF REMEDIES, (1st ed. 1973); at 1 & 2. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 66 (1978); Dellinger, *Of Rights and Remedies: The Constitution Is A Sword*, 85 HARV. L. REV. 1532 (1972); Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969); Rendleman, *The New Due Process: Rights and Remedies*, 63 KY. L.J. 532, 612 (1975); Grant, *The Legal Effect of a Ruling That a Statute Is Unconstitutional*, 2 DET. C.L. REV. 201 (1978); Note, *The Effect of Declaring a Statute Unconstitutional*, 33 CORNELL L.Q. 281 (1947); Note, *Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decisions*, 60 HARV. L. REV. 437 (1947). *Compare* Trescott v. City of Waterloo, 26 F. 592 (D. Iowa 1885); Geltcke v. Dubuque, 1 Wall. 175 (1864) and their progeny.

[55] Definition of the contours of municipal liability and answers to the question of what defenses, if any, government can cite are coming forth from the lower federal courts. While by no means the result of the application of settled doctrine, these cases (which appear at first blush to be locked in conflict) tacitly recognize an underlying, systematizing idea at work: namely, that a governmental entity should be accorded all tort defenses traditionally available under § 1983 to its employees as individual defendants when the statute is invoked to provide a tort remedy for damages against the entity for misconduct. *Compare* Bertot v. School Dist. No. 1, Albany County, Wyo., 48 U.S.L.W. 2407 (10th Cir. 1979); Sala v. County of Suffolk, 604 F.2d 207 (2d Cir. 1979); Ohland v. City of Montpelier, 467 F.

Questions Presented in *Owen*, the seed crystal will have been dropped by the High Court into the chemistry of Section 1983 cases so that the solution will begin to crystalize.

The Owen *case was decided by the Supreme Court after this article had been printed. The complexity of the issues involved does not allow extensive discussion of the impact of that decision upon the concepts explored in this article. The author will publish an additional article in the Fall, 1980 issue of* The Urban Lawyer.

Supp. 324 (D. Vt. 1979); Leite v. City of Prov., 463 F. Supp. 585 (D.R.I. 1978); Atcherson v. Sieberman, 605 F.2d 1058 (8th Cir.); DeShields v. U.S. Parole Comm., 593 F.2d 354 (8th Cir. 1979); Garner v. Memphis Police Dept., 500 F.2d 52 (6th Cir. 1979); Zoll v. Eastern Allamakee Commun. School Dist., 588 F.2d 246 (8th Cir. 1978); Holley v. Lavine, 605 F.2d 638 (2d Cir. 1979); Coffy v. Multi-County Narc. Bureau, 600 F.2d 570 (6th Cir. 1979); T & M Homes, Inc. v. Township of Mansfield, 393 A.2d 613 (N.J. 1978); Gartin v. Jefferson County, 281 N.W.2d 25 (Iowa App. 1979); Huemmer v. Mayor and City Council, 474 F. Supp. 704 (D. Md. 1979); Jacobson v. TRPA, 474 F. Supp. 901 (D. Nev. 1979); Cruz v. Beta, 603 F.2d 1178 (5th Cir. 1979); *see* Kramer, *Section 1983 and Municipal Liability: Selected Issues Two Years After Monell v. Department of Social Services*, 12 URB. LAW. 232 (1980).

Mr. Carlisle. These articles state my views on the meaning of the *Owen* case. When I summarize my conclusions in these articles, I think you will see why the reaction to my views has been as I described at the beginning of my remarks.

Far beneath it all, I conclude that, narrowly read, the Supreme Court could not have answered the question presented to it in the *Owen* case in any other way. Qualified immunity is not a defense to municipal liability under section 1983 nor should it be as long as cases such as *Village of Belle Terre* v. *Boraos,* the school desegregation cases, *Town of Lockport* v. *Citizens for Community Action,* and *Craig* v. *Boren* can be brought under the statute.

These section 1983 cases have not involved tort liability at all. Instead, they are cases seeking declaratory and coercive relief against various basic policy decisions of local government which are alleged to be unconstitutional.

The so-called good faith defense—an unfortunate and misleading label—is simply irrelevant in these types of cases. It makes no difference whether or not the Government officials acted with or without malice, whether or not they acted in disregard of settled law, or whether or not they had reasonable grounds for their conduct.

The subjective part of the qualified immunity defense relating to malice has never been admissible in any such judicial inquiry concerning the validity of municipal policy, per se.

Unless imputed to it on the principle of respondeat superior—which Monell prohibits—a municipality can have no malice of its own. This point was recognized by the court in the recent case, *City of Newport* v. *Fact Concerts* at 49 U.S. Law Week 4860, page 4865. Moreover, various cases and statutes refuse to allow a city to indemnify its public officials for their malicious acts.

It can be stated as a general principle that judicial review of official policy, such as of a city ordinance or other such affirmative declarations, never has concerned itself one way or the other with the conduct or misconduct of the individuals involved in making that policy because local government has always been fully immune—if that is the word which adequately describes the fact that a tort cause of action has never existed—from any tort remedy directed against its basic policy decisions. If liable at all for the misconduct of its officials, it was liable only on a respondeat superior theory and then only if that misconduct was not tagged "discretionary" conduct which was in furtherance of official policy. The *Owen* case itself recognizes this concept.

Government officers sued directly derived their qualified immunity and their discretionary immunity from the entity's full immunity, not the other way around. The qualified immunity defense was uniquely that of the individual defendant sued in his individual capacity.

Indeed, had the Court in *Owen* allowed qualified immunity from liability under the statute to the city of Independence, the effect would have been to cause an outcry by the plaintiff's bar due to a justifiable fear that they would be foreclosed from pursuing all other remedies, other than the tort remedy, available to a plaintiff who had actually been deprived of his constitutional rights, merely because an individual defendant had acted in good faith.

Good faith would have been, for the first time, a defense to declaratory and coercive relief which had once been granted in the cases I mentioned previously, such as *Village of Belle Terre* v. *Boraos.*

So, if *Owen* was correctly decided, narrowly read, and if a governmental entity should enjoy no qualified immunity, why and how should section 1983 be amended?

Again, the "why" is the tremendous uncertainty which even the Court recognizes in the *Fact Concerts* case at page 4862 in section 1983 litigation. Plaintiffs and defendants alike must not be required to wander forever, like Minotaur, in the section 1983 labyrinth. The "how" of the amendment is to locate the source of that uncertainty and to eliminate it.

That is not a simple task, since the muddle created by *Owen* was not because of what it decided, but what it failed to decide. Other cases such as *Thiboutot and Parratt* v. *Taylor*—the *Owen* decision's analog as to individual liability—have created confusion for the same reason.

Therefore, merely reversing those cases through congressional action will not abate the confusion. What must be addressed is the unbounded judicial discretion which continues to exist under this broadly phrased statute—discretion which leaves hundreds of Federal courts free to answer questions not presented in *Owen* and to assume that the answer to the question that was presented in *Owen* can be summarily extended to other questions, to the point that doubt even exists as to whether or not a governmental entity enjoys any immunity, absolute or qualified, from tort liability.

It seems that some Federal courts are saying that a city is strictly liable in tort once the deprivation of a Federal right under color of law caused by official policy is shown that it might be a "tort to govern." This is despite the fact that 1983 itself, unlike section 1985, says nothing about damages.

It is not an easy task to analyze why this fear of tort liability for basic policy decisions exists. I do not claim to have the only answer. It is a difficult and complex field. However, I suggest that at least six factors have combined to create the spectre of strict tort liability for invalid policy.

First, *Monroe* v. *Pape's* statement that section 1983 should be read against a background of tort liability has been emphasized so much that the statute seems to be viewed as creating only a species of tort liability.

Second, *Monroe's* dicta about the first aim of section 1983—namely, "to override certain kinds of State laws"—has not been adequately recognized as a cause of action, merely seeking judicial review, which is distinct from the type of tort case *Monroe* involved on its facts—namely, abuse of power.

Third, section 1983 jurisprudence is developing—as it must under the case and controversy doctrine—in a piecemeal fashion. For example, we are finding out about the absence of certain defenses to a municipal defendant before the nature of the plaintiff's prima facie case has been fully explored and before we know which remedies properly relate to the plaintiff's right.

Fourth, inexplicably, past decisions involving municipal defenses are analyzed, supposedly in a tort cause of action, even though those past case decisions did not involve tort law at all. This was true in the *Owen* case where the Supreme Court searched the common law, looking to contract cases, cases involving trespass and change of grade, supposedly to come to the conclusion that the municipal defense of good faith was not available in a tort action. Also, the Court looked to past case decisions which dealt with derivative liability for the misconduct of the entity's individual officers, which again is a form of strict liability which we too easily forget is not available under section 1983.

Fifth, we also forget that the bristling rhetoric of Brennan's opinion in *Owen*, particularly where it speaks of loss spreading, dealt with statutory liability only and not a tort remedy. I think this point is driven home by the *Owen* opinion on remand at 623 F. 2d 550 which vacated all prior discussion in the lower court *Owen* opinions about the tort remedy.

Sixth, the obtuse language of *Monell* which says that a city can be liable for what can "fairly be said to be official policy" comingles true official policy with the conduct of supervisory officials, which is a form, I think, of derivative liability which was supposedly disapproved in *Monell* itself, which comes simply through the definition of official policy.

These six factors do not alter the fact that a tort remedy has never properly been allowed anywhere for the purpose of attacking true official policy. The same rule should apply in cases brought under section 1983; and, accordingly section 1983 should be amended to differentiate between the "policy case" creating entity liability and the "conduct case" creating individual liability. Official policy should be defined to include those basic and hard decisions Government must make which are of general applicability and future effect, such as, for example, a historic preservation ordinance.

Professor Friedman just alluded to a case, *Sala* v. *County of Suffolk,* as an example of the type of post-*Monell* litigation which should result in governmental liability for tort damages. Because of the distasteful nature of the strip searches, involved in *Sala* allowing a tort remedy has a certain surface appeal. However, assuming *Sala* was a case attacking official policy of general applicability and future effect (such as the recently passed Missouri statute dealing with strip searches), a tort cause of action should be no more allowable there than in another case involving a different type of policy. Compare *Supreme Court of Virginia* v. *Consumers Union of the United States,* 446 U.S. 719 (1980). The nature of official policies can vary widely, but they often involve some distasteful or difficult subject, usually in situations where various societal interests are tugging at each other. No Federal court should be allowed to second guess the decisions Government makes in promulgating policy and then to penalize taxpayers by broad, unlimited damage awards for special damages (such as loss of earnings or medical expenses) and general damages (such as for embarrassment and humiliation).

Parenthetically, it should be noted that, notwithstanding Professor Friedman's assumptions in his testimony, losses in section 1983 litigation are largely uninsurable. I deal with insurance and risk management on a daily basis and can unequivocably state that if insurance is available at all, when you read the policies, you soon realize that they contain so many exclusions that they are largely worthless in the section 1983 context. No insurance company in its right mind, in view of the confusion surrounding the field, would insure anything without such broad exclusions, because there is no way that they could make an actuarial analysis of their exposure under that policy without such exclusions. Many cities, including the city of Independence, are being forced to consider the feasibility of an intergovernmental risk distribution pool for payment of civil rights judgments, simply because insurance is not available. For example, in Kansas City, a not-for-profit corporation, the Urban Law Center, has been formed to consider, among other things, a pooling system for mid-America's cities and counties. Such an extraordinary situation involving the availability of insurance is an argument in favor of, not against, a hard look at section 1983 damage awards.

However, other remedies make sense. Prospective coercive and declaratory relief should be available in any true policy case—whether the policy challenged deals with custodial searches, historical preservation, or a code of professional responsibility (as in the *Supreme Court of Virginia* case).

Even persons such as Professor Davis who have championed broad public liability for personal loss have realized that a tort proceeding is an unreliable corrective when brought by an individual who has suffered loss because of an invalid governmental regulation.

Various case decisions are being handed down which also recognize this principle, such as the critically important case, *Fred F. French* v. *City of New York*, 350 N.E. 2d 381 (1976).

Indeed, when viewing the legislative history of the Ku Klux Klan Act of 1871 and analyzing the entirety of the litigation brought under that statute to date, it seems, at least to me, readily apparent that a tort remedy should be available only against a public official sued in his individual capacity, with indemnity issued left for local decision, for his intentional tort, or when his gross negligence rises to a level of "brutality or arbitrariness which goes beyond the garden variety of State tort action."

Simple negligence could still give rise to some remedy under section 1983—restitution perhaps—but not a tort remedy for general and special damages.

Such an approach would restore the traditional congruence between constitutional rights and remedies and allow the legislature to determine how the scarce financial resources of government are best allocated, as it did with the 2-year limitation on back-pay claims under Title VII, for example.

Congress is the proper body to do this because the granting of monetary relief against Government, in the absence of legislative authorization, actively involves the judiciary in decisions of a long-range, polycentric type which, as Prof. Henry Hart once observed, raise difficult questions "which are among the most far reaching in the whole field of civil and other liberty." The time has come for Congress to awake from its 110-year sleep to make these decisions.

Again, first on the agenda is to address whether or not local government should be liable in tort for its basic policy decisions—

and not whether it should merely have a good faith immunity. This would not return us to pre-Monell days, a case which simply dealt with the definition of "person." This would insure that remedies would continue to exist against Government under section 1983; and, that Government would not be immune from all liability under the statute.

Second, Congress must define official policy.

Third, Congress must state the circumstances in which a tort remedy should be granted against a public official sued in his individual capacity and lay to rest to the questions about whether tort liability can exist for simple negligence.

Perhaps with tort doctrine settled the courts could be left alone in fashioning prospective coercive and declaratory relief under the statute.

COURT-AWARDED ATTORNEY'S FEES

I would like to turn now to the problem of court-awarded attorney's fees. My views pertaining to the Civil Rights Attorney's Fees Awards Act of 1976 amending section 1988 are more what one might expect from a city attorney. They are, in fact, largely in line with the position taken by NIMLO in its statement to you on May 6, 1981.

I respectfully suggest that the 1976 amendments to section 1988 are, simply stated, not accomplishing their purpose of encouraging meritorious civil rights cases. The reason is simple: The focus of litigation too easily strays from the constitutional right invoked to the amount of attorney's fees requested.

It might fairly be said that section 1988 achieves its aim of encouraging lawsuits to vindicate individual rights. Unfortunately, it also encourages frivolous and insubstantial suits which incur enormous costs when the injuries suffered are nominal or nonexistent.

The amendments to 1988 also encourage delay and discourage settlement.

A study of the English system of awarding attorney's fees might suggest further amendments to section 1988 to avoid these problems. The aim of the English system is to discourage frivolous lawsuits, to encourage settlement of disputes without resort to litigation, and to insure the efficient use of the courts.

In order to accomplish this, costs are generally awarded to the prevailing party in a lawsuit. However, costs are also awarded against a party whose petitions are unnecessarily lengthy, whose pleadings allege scandalous matter, who engages in delaying tactics, who unnecessarily uses motions or discovery for harassment, or who insists on putting undisputed facts to proof—situations which exist all too frequently in section 1983 litigation.

Most awards of attorney's fees in the English system are governed by statute and are made by a taxing master according to a set schedule. Under this approach, the amount to be awarded for any given act of the attorney is not disputed. However, the parties may dispute whether or not the undertaking of that act by the attorney was necessary.

In limited instances, the amount of the fee is discretionary and based upon factors similar to those used in the United States.

However, in the English system litigation as to the amount of attorney's fees does not in and of itself create a right to additional fees.

Another look at the means of obtaining the proper aim of section 1988 is necessary, and the English system suggests the desirability of a more structured approach.

There are variations to Federal Rule 68 which I refer to in my testimony and which I will not go into unless you so desire, Senator.

For obvious reasons, a restructuring of section 1988 is of particular importance in the face of the evolving definition and uncertainty, as the Supreme Court said in fact concerts, of the contours of municipal liability.

SUMMARY

S. 584 and S. 585 are understandable reactions to the Supreme Court's current construction of section 1983.

Speaking strictly as a city attorney and an advocate worried about the effects of *Owen* and not the cause of the problem, both bills have much to offer.

However, the current confusion surrounding section 1983 litigation runs much deeper than a perfunctory reversal of these two cases can address.

Principles of federalism and a study of the separation of powers doctrine, and the role of local government in the United States, should reveal that section 1983 must be amended to show that it is not "a tort to govern" and that general, special, and punitive damages should not be available to a plaintiff harmed by a basic policy decision of local government.

However, such a plaintiff should not be left remediless. He should enjoy the traditional remedy of having such official policy declared invalid as an unreasonable exercise of power.

If, however, notwithstanding *Monell,* cities are to have derivative liability for the conduct of their officials, even high-ranking officials, then if that cause of action is to be imputed to the city, obviously, the defenses of the individual should be imputed as well.

Second, since *Maher* v. *Gagne* was decided last year, no settlement of section 1983 litigation can occur unless attorney's fees are paid. Einstein once observed that the two major problems of our century have been the confusion of aims and the perfection of means. The means and aims of the English system and, for that matter, the NIMLO proposal on attorney's fees seem more perfected and less confused than section 1988, *Maher,* and their progeny.

Senator, should you have any questions, I will try to answer them to the best of my ability.

Senator HATCH. Thank you.

Will the lack of good faith defense insure that the officials of the city of Independence will not commit another constitutional offense such as the one the court has decried in *Owen*?

Mr. CARLISLE. I obviously view the good faith defense as something that pertains to the individual only. I do not think that we have seen a lot of conversation about how the good faith defense affects an individual's action.

In other words, the defense is that of the individual, and it will either deter the individual or not. The entity is a collective body. It is something that can only make collective decisions and really can have no state of mind of its own.

So it is properly the defense of the individual, but what really is necessary is that the entity not have tort liability for its basic policy decisions payable ultimately by the taxpayers.

Senator HATCH. What further changes would you suggest in section 1988 which would reduce the incentive to bring section 1983 claims while still maintaining the basic purpose of section 1988 so that poor people can have the benefit of competent counsel in securing their constitutional rights?

Mr. CARLISLE. I think there are several things that have been mentioned. First, 1988 should not provide attorney's fees for enforcement of all Federal statutes. It was intended to deal with civil rights, and it should be restricted to that subject.

Second, the focus has to be placed upon the constitutional rights of the plaintiff, and the forum has to be available to the plaintiff to come into court to get what in many cases could be a quick resolution of his problem. In many situations, it should not even be done in the judicial context; it should be done in the city's own claims procedure.

I think that to fairly compensate the plaintiff the trick should be to avoid attorney's fees early on—to require the plaintiff and his attorney, if he has one, to try and reach an agreed settlement before court suit is even filed.

Once court suit is filed, you have lost, and then everything becomes extremely expensive. You are paying for depositions; you are paying for the attorney's fees and the other court costs that you incur. So you should try to avoid litigation.

Once in litigation, if there was no agreed settlement before the filing of the case, there should be some sort of provision which requires the plaintiff to make a demand—to literally file a demand—stating what relief the plaintiff seeks.

Senator, in the *Owen* case, for example, at its base, Chief Owen simply wanted a name-clearing hearing. We probably would have given him a name-clearing hearing had he made that request. It was not even a part of his complaint. He had made no demand specifically for a name-clearing hearing.

The case degenerated as soon as it was filed into basically a question of attorney's fees, backpay, and things that were superfluous to his base claim.

If, within 30 days of the filing of the answer, Chief Owen had made a request for a name-clearing hearing, certainly now, after 1976—this happened in 1973—where the city would be facing not only its own attorney's fees but the attorney's fees of the plaintiff, that demand would be given serious consideration and if accepted by the city or any defendant—speaking generally—it should be structured in such fashion that it could be accepted without incurring attorney's fees.

Senator HATCH. Do you feel that section 1988, as currently constructed, actually leads to incentives not to settle cases?

Mr. CARLISLE. I do not think there is any doubt that, after *Maher* v. *Gagne,* when two attorneys sit down together to negotiate a settlement, the attorney's fees issue, particularly early on, is the primary problem that sits between the two parties in arriving at an agreed settlement. I think it causes problems.

This is one reason, perhaps, that the American rule has existed for so many years. You do not want the attorney's fees issue to get in the way of reaching a just solution to the case.

Senator HATCH. Thank you, Mr. Carlisle. We appreciate the effort you have put forth in being here today, as one who has been intimately involved in these problems. We have appreciated listening to your testimony.

Without objection, your prepared text will be included in the record at this point.

[Material follows:]

PREPARED STATEMENT OF RICHARD G. CARLISLE

MR. CHAIRMAN AND DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE ON THE CONSTITUTION:

I WANT TO THANK YOU FOR YOUR REQUEST FOR MY TESTIMONY IN THESE IMPORTANT HEARINGS. (MY NAME IS RICHARD CARLISLE.) I AM COCHAIRMAN OF THE AMERICAN BAR ASSOCIATION'S NATIONAL INSTITUTE ON CIVIL RIGHTS LIABILITY, PLANNING CHAIRMAN FOR THE SECTION 1983 PROGRAM BEING DEVELOPED FOR THE ABA'S ANNUAL MEETING IN AUGUST, AND CITY COUNSELOR FOR THE CITY OF INDEPENDENCE, MISSOURI.

HOWEVER, I DO NOT APPEAR BEFORE YOU TODAY ON BEHALF OF THE AMERICAN BAR ASSOCIATION, THE CITY OF INDEPENDENCE OR ANY OTHER CITY. I SAY THIS BECAUSE, SINCE ARGUING THE OWEN CASE EIGHTEEN MONTHS AGO, I HAVE LECTURED THROUGHOUT THE UNITED STATES AND HAVE LEARNED THAT MY VIEWS ARE LARGELY, IF NOT EXCLUSIVELY, MY OWN. AFTER MY LECTURE AT THE RECENT ABA NATIONAL INSTITUTE, I WAS ACCUSED BY SOME MEMBERS OF THE PLAINTIFF'S BAR OF BEING TOO DEFENSE ORIENTED. AFTER MUCH THE SAME LECTURE AT THE LAST ANNUAL MEETING OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, I WAS ACCUSED OF BEING UNAWARE OF THE PLIGHT OF THE MUNICIPAL DEFENDANT. CHUCK ABERNATHY, WHO TESTIFIED BEFORE YOU ON MAY 6TH, WENT SO FAR AS TO EXPRESS HIS SURPRISE AT THE BALANCE OF MY VIEWS IN THE WAKE OF THE OUTCRY AFTER OWEN.

SUCH DIVERSE REACTION SEEMINGLY EXISTS NOT JUST TO MY VIEWS BUT TO ALMOST ANYTHING THAT IS SAID ABOUT SECTION 1983. THERE IS A REASON FOR THIS: SECTION 1983, UNLIKE MANY OTHER CIVIL RIGHTS STATUTES, CONTAINS ABSOLUTELY NO RULES GOVERNING ITS APPLICATION. 1983 MERELY STATES THE BROAD PRINCIPLE THAT THE FEDERAL COURTS SHOULD PROVIDE PROPER REMEDIES FOR DEPRIVATION OF FEDERAL RIGHTS. THE COURTS HAVE BEEN LEFT TO FORMULATE RULES FOR THE APPLICATION OF THIS PRINCIPLE--WHILE JUDICIAL REASONING, BY ITS VERY NATURE HAS BEEN RECOGNIZED AS BEING INCAPABLE OF PRODUCING MANY RULES WHICH PROVE ADEQUATE FOR DEALING WITH A COMPLEX LEGAL SITUATION. JUDGE MADE RULES IN THE LAW OF CONTRACTS, FOR EXAMPLE, WERE SO LACKING THAT LEGISLATORS WERE FORCED TO REMEDY THE CONFUSION BY RESTRUCTURING THE CONTRACTUAL PROCESS. THE LEGISLATURE WAS IN A POSITION TO DO THIS BECAUSE IT WAS MORE SKILLED AT COMPROMISE AND

CONCESSION OF BROAD SOCIETAL ISSUES. WHAT RESULTED WERE INSURANCE CODES AND UNIFORM LAWS DEALING WITH NEGOTIABLE INSTRUMENTS, SALES, STOCK TRANSFERS, CONDITIONAL SALES, AND SO FORTH.

I DO NOT PROPOSE THAT SECTION 1983 COULD OR SHOULD BE QUANTIFIED TO THIS EXTENT. HOWEVER, THE LEGISLATURE IS THE ONLY PROPER BODY TO SORT OUT THE PRESENT CONFUSION SURROUNDING THE APPLICATION OF SECTION 1983; AND, THEREFORE, IT IS THE SPECIAL PROVINCE OF THIS COMMITTEE TO BEGIN THE PROCESS OF CARRYING THE JUST DEVELOPMENT OF CIVIL RIGHTS LAW BEYOND WHAT CAN BE ACCOMPLISHED SOLELY THROUGH JUDICIAL INTERPRETATION. ISSUES CONCERNING LIMITATION OF ACTIONS, EXHAUSTION, LIMITS ON LIABILITY, AND CIVIL DIVERSION SHOULD BE CONSIDERED. DEFINITIONS (MOST CRITICALLY OF "OFFICIAL POLICY") SHOULD BE FASHIONED. LESSONS CAN BE LEARNED FROM PRIOR LEGISLATION SUCH AS THE ADMINISTRATIVE PROCEDURE ACT, THE FEDERAL TORT CLAIMS ACT, AND OTHER CIVIL RIGHTS LAWS. FOR EXAMPLE, I THINK THAT IT IS BEYOND DOUBT THAT A PROVISION, SIMILAR TO THAT PRESENT IN THE FEDERAL TORT CLAIMS ACT, WITHHOLDING COURT SUITS UNTIL THE POSSIBILITY OF AN AGREED SETTLEMENT HAS BEEN EXPLORED, WOULD ENCOURAGE SPEEDY JUSTICE, AVOID UNNECESSARY ACCUMULATION OF ATTORNEY'S FEES, AND LESSEN THE CASE LOAD BURDEN OF THE FEDERAL COURTS.

S. 584 AND S. 585

I HAVE IN MIND OTHER AMENDMENTS; HOWEVER, IT MAY NOT BE THE INTENT OF THIS SUBCOMMITTEE TO UNDERTAKE ANY PROJECT BEYOND THE SCOPE OF CONSIDERING THE EFFECTS OF THIBOUTOT AND OWEN.

(HERE DISCUSS THIBOUTOT IN LIGHT OF MIDDLESEX).

TURNING TO OWEN, TIME DOES NOT ALLOW EXTENSIVE EXPLORATION OF ITS COMPLEXITIES. I HAVE ATTACHED TWO LAW REVIEW ARTICLES WHICH I HAVE WRITTEN WHICH STATE MY VIEWS ON THE MEANING OF THE OWEN CASE. WHEN I SUMMARIZE MY CONCLUSIONS IN THESE ARTICLES, I THINK YOU WILL SEE WHY THE REACTION TO MY VIEWS HAS BEEN AS I DESCRIBED AT THE BEGINNING OF MY REMARKS. FOR, BENEATH IT ALL, I CONCLUDE THAT, NARROWLY READ, THE SUPREME COURT COULD NOT HAVE ANSWERED THE QUESTION PRESENTED TO IT IN OWEN IN ANY OTHER WAY. QUALIFIED IMMUNITY IS NOT A DEFENSE TO MUNICIPAL LIABILITY UNDER SECTION 1983, NOR SHOULD IT BE, AS LONG AS CASES SUCH AS VILLAGE OF BELLE TERRE V. BORAAS, THE SCHOOL

DESEGREGATION CASES, TOWN OF LOCKPORT V. CITIZENS FOR COMMUNITY ACTION, AND CRAIG V. BOREN CAN BE BROUGHT UNDER THE STATUTE. THESE SECTION 1983 CASES HAVE NOT INVOLVED TORT LIABILITY AT ALL. INSTEAD, THEY ARE CASES SEEKING DECLARATORY AND COERCIVE RELIEF AGAINST VARIOUS BASIC POLICY DECISIONS OF LOCAL GOVERNMENT WHICH ARE ALLEGED TO BE UNCONSTITUTIONAL.

THE SO-CALLED "GOOD FAITH DEFENSE" (AN UNFORTUNATE AND MISLEADING LABEL) IS SIMPLY IRRELEVANT IN SUCH CASES. IT MAKES NO DIFFERENCE (1) WHETHER OR NOT THE GOVERNMENT OFFICIALS ACTED WITH OR WITHOUT MALICE, (2) WHETHER OR NOT THEY ACTED IN DISREGARD OF SETTLED LAW, OR (3) WHETHER OR NOT THEY HAD REASONABLE GROUNDS FOR THEIR CONDUCT. THE SUBJECTIVE PART OF THE QUALIFIED IMMUNITY DEFENSE (RELATING TO MALICE) HAS NEVER BEEN ADMISSABLE IN ANY JUDICIAL INQUIRY CONCERNING THE VALIDITY OF MUNICIPAL POLICY PER SE. UNLESS IMPUTED TO IT ON THE PRINCIPLE OF RESPONDEAT SUPERIOR (WHICH MONELL PROHIBITS), A MUNICIPALITY CAN HAVE NO MALICE OF ITS OWN. CITY OF NEWPORT V. FACT CONCERTS, 49 U.S. LAW WEEK 4860, 4865 (1981). MOREOVER, VARIOUS CASES AND STATUTES REFUSE TO ALLOW A CITY TO INDEMNIFY ITS PUBLIC OFFICIALS FOR THEIR MALICIOUS ACTS.

IT CAN BE STATED AS A GENERAL PRINCIPLE THAT JUDICIAL REVIEW OF OFFICIAL POLICY (SUCH AS OF A CITY ORDINANCE OR OTHER SUCH AFFIRMATIVE DECLARATIONS) NEVER HAS CONCERNED ITSELF, ONE WAY OR THE OTHER, WITH CONDUCT OR MISCONDUCT OF THE INDIVIDUALS INVOLVED IN MAKING THAT POLICY BECAUSE LOCAL GOVERNMENT HAS ALWAYS BEEN FULLY IMMUNE FROM ANY TORT REMEDY DIRECTED AGAINST ITS BASIC POLICY DECISIONS. IF LIABLE AT ALL, IT WAS LIABLE ONLY ON A RESPONDEAT SUPERIOR THEORY FOR THE MISCONDUCT OF ITS OFFICIALS--AND THEN, ONLY IF THAT MISCONDUCT WAS NOT TAGGED "DISCRETIONARY" CONDUCT WHICH WAS IN FURTHERANCE OF OFFICIAL POLICY. GOVERNMENT OFFICERS SUED DIRECTLY DERIVED THEIR "QUALIFIED IMMUNITY" AND THEIR "DISCRETIONARY IMMUNITY" FROM THE ENTITY'S FULL IMMUNITY--NOT THE OTHER WAY AROUND. THE QUALIFIED IMMUNITY DEFENSE WAS UNIQUELY THAT OF THE INDIVIDUAL DEFENDANT SUED IN HIS INDIVIDUAL CAPACITY.

INDEED, HAD THE COURT IN OWEN ALLOWED QUALIFIED IMMUNITY FROM LIABILITY UNDER THE STATUTE TO THE CITY OF INDEPENDENCE, THE EFFECT WOULD HAVE

BEEN TO CAUSE AN OUTCRY BY THE PLAINTIFF'S BAR DUE TO A JUSTIFIABLE FEAR THAT THEY WOULD BE FORECLOSED FROM PURSUING ALL REMEDIES AVAILABLE TO A PLAINTIFF WHO HAD ACTUALLY BEEN DEPRIVED OF HIS CONSTITUTIONAL RIGHTS MERELY BECAUSE AN INDIVIDUAL DEFENDANT HAD ACTED IN "GOOD FAITH".

"GOOD FAITH" WOULD HAVE BEEN, FOR THE FIRST TIME, A DEFENSE TO DECLARATORY AND COERCIVE RELIEF WHICH HAD ONCE BEEN GRANTED IN THE CASES, MENTIONED PREVIOUSLY, SUCH AS VILLAGE OF BELLE TERRE AND THE SCHOOL DESEGREGATION LITIGATION.

SO, IF OWEN WAS CORRECTLY DECIDED; AND, IF A GOVERNMENTAL ENTITY SHOULD ENJOY NO QUALIFIED IMMUNITY, WHY AND HOW SHOULD SECTION 1983 BE AMENDED? AGAIN, THE WHY IS THE TREMENDOUS UNCERTAINTY, WHICH EVEN THE COURT RECOGNIZES (FACT CONCERTS, 49 USLW AT 4862), IN SECTION 1983 LITIGATION. PLAINTIFFS AND DEFENDANTS MUST NOT BE REQUIRED TO WANDER FOREVER, LIKE MINOTAUR, IN THE SECTION 1983 LABYRINTH. THE HOW IS TO FIND THE SOURCE OF THAT UNCERTAINTY AND TO ELIMINATE IT.

THE LATTER IS NOT A SIMPLE TASK, SINCE THE MUDDLE CREATED BY OWEN WAS NOT BECAUSE OF WHAT IT DECIDED, BUT WHAT IT FAILED TO DECIDE. OTHER CASES SUCH AS THIBOUTOT AND PARRATT V. TAYLOR (A CASE WHICH IS THE OWEN DECISION'S ANALOGUE AS TO INDIVIDUAL DEFENDANTS) HAVE CREATED CONFUSION FOR THE SAME REASON. THEREFORE, MERELY REVERSING THOSE CASES THROUGH CONGRESSIONAL ACTION WILL NOT ABATE THE CONFUSION.

WHAT MUST BE ADDRESSED IS THE UNBOUNDED JUDICIAL DISCRETION WHICH CONTINUES TO EXIST UNDER THIS BROADLY PHRASED STATUTE--DISCRETION WHICH LEAVES HUNDREDS OF FEDERAL COURTS FREE TO ANSWER QUESTIONS NOT PRESENTED IN OWEN AND TO ASSUME THAT THE ANSWER TO THE QUESTION THAT WAS PRESENTED IN OWEN CAN BE SUMMARILY EXTENDED TO OTHER QUESTIONS--TO THE POINT THAT DOUBT EVEN EXISTS AS TO WHETHER OR NOT A GOVERNMENTAL ENTITY ENJOYS ANY IMMUNITY, ABSOLUTE OR QUALIFIED, FROM TORT LIABILITY. IN OTHER WORDS, IT SEEMS THAT SOME FEDERAL COURTS ARE SAYING THAT A CITY IS STRICTLY LIABLE IN TORT ONCE THE (1) DEPRIVATION OF A FEDERAL RIGHT (2) UNDER COLOR OF LAW (3) CAUSED BY OFFICIAL POLICY IS SHOWN--THAT IT MIGHT BE A "TORT TO GOVERN". COMPARE McCULLOCK V. GLASGOW, 620F. 2ND 47 (5TH CIRCUIT 1980).

IT IS NOT AN EASY TASK TO SAY WHY THIS SEEMS TRUE. I DON'T CLAIM TO HAVE THE ONLY ANSWER: HOWEVER, I SUGGEST THAT AT LEAST SIX FACTORS HAVE COMBINED TO CREATE THE SPECTRE OF STRICT TORT LIABILITY FOR INVALID POLICY. FIRST: MONROE V. PAPE'S STATEMENT THAT SECTION 1983 SHOULD BE READ AGAINST A "BACKGROUND OF TORT LIABILITY" HAS BEEN EMPHASIZED SO MUCH THAT THE STATUTE SEEMS TO BE VIEWED AS CREATING ONLY "A SPECIES OF TORT LIABILITY" (DESPITE THE FACT THAT 1983, UNLIKE SECTION 1985, SAYS NOTHING ON ITS FACE ABOUT DAMAGES). SECOND: MONROE'S DICTA ABOUT THE FIRST "AIM" OF SECTION 1983 (TO "OVERRIDE CERTAIN KINDS OF STATE LAWS") HAS NOT BEEN ADEQUATELY RECOGNIZED AS A CAUSE OF ACTION, MERELY SEEKING JUDICIAL REVIEW, WHICH IS DISTINCT FROM THE TYPE OF TORT CASE MONROE INVOLVED (ABUSE OF POWER). THIRD: SECTION 1983 JURISPRUDENCE IS DEVELOPING (AS IT MUST UNDER THE CASE AND CONTROVERSY DOCTRINE) IN A PIECEMEAL FASHION; FOR EXAMPLE, WE ARE FINDING OUT ABOUT THE ABSENCE OF CERTAIN DEFENSES TO A MUNICIPAL DEFENDANT BEFORE THE NATURE OF THE PLAINTIFF'S PRIMA FACIE CASE HAS BEEN FULLY EXPLORED (AND BEFORE WE KNOW WHICH REMEDIES PROPERLY RELATE TO THE PLAINTIFF'S RIGHT). FOURTH: PAST CASE DECISIONS INVOLVING MUNICIPAL DEFENSES ARE ANALYZED WHICH DON'T INVOLVE TORT LAW AT ALL, OR WHICH DEAL WITH DERIVATIVE LIABILITY FOR MISCONDUCT (A FORM OF STRICT LIABILITY WHICH WE TOO EASILY FORGET IS NOT AVAILABLE UNDER 1983). FIFTH: WE ALSO FORGET THAT THE BRISTLING RHETORIC OF BRENNAN'S OPINION IN OWEN, PARTICULARLY WHERE IT SPEAKS OF LOSS SPREADING, DEALT WITH STATUTORY LIABILITY, AND NOT A TORT REMEDY (SEE OWEN ON REMAND AT 623 F. 2ND 550). SIXTH: THE OBTUSE LANGUAGE OF MONELL WHICH SAYS THAT A CITY CAN BE LIABLE FOR WHAT CAN "FAIRLY BE SAID TO BE OFFICIAL POLICY" COMINGLES TRUE OFFICIAL POLICY WITH THE CONDUCT OF HIGH-RANKING OFFICIALS (DERIVATIVE LIABILITY THROUGH THE DEFINITION OF OFFICIAL POLICY).

A TORT REMEDY HAS NEVER BEEN PROPERLY ALLOWED, ANYWHERE, FOR THE PURPOSE OF ATTACKING TRUE OFFICIAL POLICY. THE SAME RULE SHOULD APPLY IN CASES BROUGHT UNDER SECTION 1983; AND, ACCORDINGLY, SECTION 1983 SHOULD BE AMENDED TO DIFFERENTIATE BETWEEN THE "POLICY CASE" (CREATING ENTITY LIABILITY) AND "THE CONDUCT CASE" (CREATING INDIVIDUAL LIABILITY). OFFICIAL POLICY SHOULD BE DEFINED TO INCLUDE THOSE BASIC (AND HARD) DECISIONS GOVERNMENT MUST

MAKE WHICH ARE OF GENERAL APPLICABILITY AND FUTURE AFFECT (SUCH AS, FOR EXAMPLE, A HISTORIC PRESERVATION ORDINANCE). A TORT REMEDY SHOULD NOT BE ALLOWED TO SEEK JUDICIAL REVIEW OF SUCH DECISIONS, HOWEVER, COERCIVE AND DECLARATORY REMEDIES SHOULD BE AVAILABLE. EVEN PERSONS, SUCH AS PROFESSOR K. C. DAVIS, WHO HAVE CHAMPIONED BROAD PUBLIC LIABILITY FOR PERSONAL LOSS HAVE REALIZED THAT A TORT PROCEEDING IS AN UNRELIABLE CORRECTIVE WHEN BROUGHT BY AN INDIVIDUAL WHO HAS SUFFERED LOSS BECAUSE OF AN INVALID GOVERNMENTAL REGULATION. COMPARE FRED F. FRENCH V. CITY OF NEW YORK, 350 N.E. 2ND 381 (1976).

INDEED, WHEN VIEWING THE LEGISLATIVE HISTORY OF THE KU KLUX KLAN ACT OF 1871 AND ANALYZING THE ENTIRETY OF THE LITIGATION BROUGHT UNDER THAT STATUTE TO DATE, IT SEEMS TO ME READILY APPARENT THAT A TORT REMEDY SHOULD BE AVAILABLE ONLY (1) AGAINST A PUBLIC OFFICIAL SUED IN HIS INDIVIDUAL CAPACITY (WITH INDEMNITY ISSUES LEFT FOR LOCAL DECISION), (2) FOR HIS INTENTIONAL TORT OR WHEN HIS GROSS NEGLIGENCE RISES TO A LEVEL OF "BRUTALITY OR ARBITRARINESS WHICH GOES BEYOND THE GARDEN VARIETY OF STATE TORT ACTION." SHAPO, CONSTITUTIONAL TORT: MONROE V. PAPE AND THE FRONTIERS BEYOND, 60 NW. L. REV. 277, 323-24 (1965). SIMPLE NEGLIGENCE COULD STILL GIVE RISE TO SOME REMEDY UNDER THE STATUTE (RESTITUTION PERHAPS), BUT NOT A TORT REMEDY FOR GENERAL AND SPECIAL DAMAGES.

SUCH AN APPROACH WOULD RESTORE THE TRADITIONAL CONGRUENCE BETWEEN CONSTITUTIONAL RIGHTS AND REMEDIES; AND, ALLOW THE LEGISLATURE TO DETERMINE HOW THE SCARCE FINANCIAL RESOURCES OF GOVERNMENT ARE BEST ALLOCATED (AS IT DID WITH THE TWO YEAR LIMITATION ON BACK PAY CLAIMS UNDER TITLE VII, FOR EXAMPLE). CONGRESS IS THE PROPER BODY TO DO THIS BECAUSE THE GRANTING OF MONETARY RELIEF AGAINST GOVERNMENT, IN THE ABSENCE OF LEGISLATIVE AUTHORIZATION, ACTIVELY INVOLVES THE JUDICIARY IN DECISIONS OF A LONG-RANGE, POLYCENTRIC TYPE WHICH, AS PROFESSOR HENRY HART ONCE OBSERVED, RAISE DIFFICULT QUESTIONS "WHICH ARE AMONG THE MOST FAR REACHING IN THE WHOLE FIELD OF CIVIL AND OTHER LIBERTY."

THE TIME HAS COME FOR CONGRESS TO AWAKEN FROM ITS ONE HUNDRED AND TEN YEAR SLEEP TO MAKE THESE DECISIONS. FIRST ON THE AGENDA: TO ADDRESS WHETHER OR NOT LOCAL GOVERNMENT SHOULD BE LIABLE IN TORT FOR ITS BASIC POLICY

DECISIONS (AND NOT WHETHER IT MERELY SHOULD HAVE A LIMITED "GOOD FAITH" IMMUNITY). SECOND: TO DEFINE "OFFICIAL POLICY". THIRD: TO STATE THE CIRCUMSTANCES IN WHICH A TORT REMEDY SHOULD BE GRANTED AGAINST A PUBLIC OFFICIAL SUED IN HIS INDIVIDUAL CAPACITY.

PERHAPS WITH TORT DOCTRINE SETTLED, THE COURTS COULD BE LEFT ALONE IN FASHIONING PROSPECTIVE COERCIVE AND DECLARATORY RELIEF IN A MANNER CONSISTENT WITH THE SEPARATION OF POWERS DOCTRINE, SINCE THE PROBLEM WITH THE EXTENT TO WHICH THE EQUITABLE DECREES OF THE FEDERAL COURTS MIGHT HAVE INVADED THE PROVINCE OF CO-EQUAL BRANCHES OF GOVERNMENT IS TRACEABLE TO SOURCES OTHER THAN SECTION 1983.

COURT-AWARDED ATTORNEYS' FEES

MY VIEWS PERTAINING TO THE CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT OF 1976, AMENDING 42 USC SECTION 1988, ARE MORE WHAT ONE MAY EXPECT FROM A CITY ATTORNEY. THEY ARE, IN FACT, LARGELY IN LINE WITH THE POSITION TAKEN BY NIMLO IN ITS STATEMENT TO YOU ON MAY 6TH, 1981.

I RESPECTFULLY SUGGEST THAT THE 1976 AMENDMENTS TO SECTION 1988 ARE, SIMPLY STATED, NOT ACCOMPLISHING THEIR PURPOSE OF ENCOURAGING MERITORIOUS CIVIL RIGHTS CASES. THE REASON IS SIMPLE: THE FOCUS OF LITIGATION TOO EASILY STRAYS FROM THE CONSTITUTIONAL RIGHT INVOKED TO THE AMOUNT OF ATTORNEY'S FEES REQUESTED. IT MIGHT FAIRLY BE SAID THAT SECTION 1988 ACHIEVES ITS AIM OF ENCOURAGING LAW SUITS TO VINDICATE INDIVIDUAL RIGHTS, UNFORTUNATELY IT ALSO ENCOURAGES FRIVOLOUS AND INSUBSTANTIAL SUITS WHICH INCUR ENORMOUS COSTS WHEN THE INJURIES SUFFERED ARE NOMINAL OR NONEXISTENT. IT ENCOURAGES DELAY AND DISCOURAGES SETTLEMENT.

A STUDY OF THE ENGLISH SYSTEM OF AWARDING ATTORNEY'S FEES MIGHT SUGGEST FURTHER AMENDMENTS TO SECTION 1988 TO AVOID THESE PROBLEMS. THE AIM OF THE ENGLISH SYSTEM IS TO DISCOURAGE FRIVOLOUS LAW SUITS, TO ENCOURAGE SETTLEMENT OF DISPUTES WITHOUT RESORT TO LITIGATION, AND TO ENSURE THE EFFICIENT USE OF THE COURTS. IN ORDER TO ACCOMPLISH THIS, COSTS ARE GENERALLY AWARDED THE PREVAILING PARTY IN A LAWSUIT; HOWEVER, COSTS ARE ALSO AWARDED AGAINST A PARTY WHOSE PETITIONS ARE UNNECESSARILY LENGTHY, WHOSE PLEADINGS ALLEGE SCANDALOUS MATTER, WHO ENGAGES IN DELAYING TACTICS, WHO UNNECESSARILY USES MOTIONS OR DISCOVERY FOR HARRASSMENT, OR WHO INSISTS ON PUTTING

UNDISPUTED FACTS TO PROOF. MOST AWARDS OF ATTORNEY'S FEES IN THE ENGLISH SYSTEM ARE GOVERNED BY STATUTE AND ARE MADE BY A TAXING MASTER ACCORDING TO A SET SCHEDULE. UNDER THIS APPROACH THE AMOUNT TO BE AWARDED FOR ANY GIVEN ACT OF THE ATTORNEY IS NOT DISPUTED; HOWEVER, THE PARTIES MAY DISPUTE WHETHER OR NOT THE UNDERTAKING OF THAT ACT BY THE ATTORNEY WAS NECESSARY. IN LIMITED INSTANCES THE AMOUNT OF THE FEE IS DISCRETIONARY AND BASED UPON FACTORS SIMILAR TO THOSE USED IN THE UNITED STATES; HOWEVER, IN THE ENGLISH SYSTEM LITIGATION AS TO THE AMOUNT OF ATTORNEY'S FEES DOES NOT, IN AND OF ITSELF, CREATE A RIGHT TO ADDITIONAL FEES.

ANOTHER LOOK AT THE MEANS OF OBTAINING THE PROPER AIM OF SECTION 1988 IS NECESSARY; AND, THE ENGLISH SYSTEM SUGGESTS THE DESIRABILITY OF A MORE STRUCTURED APPROACH.

IT MAY BE THAT A REFUSAL OF ATTORNEY'S FEES, IN SOME CIRCUMSTANCES, WOULD BETTER ACHIEVE THIS AIM. ASSUMING THAT AN INJURED PLAINTIFF BEST KNOWS THE RELIEF SOUGHT, THEN PERHAPS THAT PLAINTIFF SHOULD BE REQUIRED TO MAKE A DEMAND FOR JUDGMENT (PERHAPS WITHIN THIRTY DAYS AFTER THE FILING OF THE ANSWER). IF WITHIN TEN DAYS AFTER SERVICE OF THE DEMAND THE DEFENDANT ACCEPTS, HE MAY DO SO WITHOUT THE PAYMENT OF ATTORNEY'S FEES. IF THE PLAINTIFF ULTIMATELY GETS THE RELIEF DEMANDED, THEN AN AWARD OF ATTORNEY'S FEES WOULD BE IN ORDER.

THIS VARIATION ON THE PROVISIONS OF FEDERAL RULE 68 PERTAINING TO OFFERS OF JUDGMENT SEEMINGLY IS WARRANTED SINCE UNDER SECTION 1988 THE DEFENDANT MUST WORRY ABOUT THE ACCUMULATION OF FEES FOR BOTH HIS ATTORNEY AND THE PLAINTIFF'S ATTORNEY IF HE SHOULD FAIL TO ACCEPT THE DEMAND.

FOR OBVIOUS REASONS, A RESTRUCTURING OF SECTION 1988 IS OF PARTICULAR IMPORTANCE IN THE FACE OF THE "EVOLVING DEFINITION AND UNCERTAINTY" OF THE CONTOURS OF MUNICIPAL LIABILITY.

SUMMARY

S. 584 AND S. 585 ARE UNDERSTANDABLE REACTIONS TO THE SUPREME COURT'S CURRENT CONSTRUCTION OF SECTION 1983. SPEAKING STRICTLY AS A CITY ATTORNEY WORRIED ABOUT THE SURFACE EFFECTS OF OWEN AND THIBOUTOT, THEY HAVE MUCH TO

OFFER. HOWEVER, THE CURRENT CONFUSION SURROUNDING SECTION 1983 LITIGATION RUNS MUCH DEEPER THAN A PERFUNCTORY REVERSAL OF THESE TWO CASES CAN ADDRESS. PRINCIPLES OF FEDERALISM AND A STUDY OF THE SEPARATION OF POWERS DOCTRINE SHOULD REVEAL THAT SECTION 1983 SHOULD BE AMENDED TO SHOW THAT IT IS NOT "A TORT TO GOVERN", AND THAT GENERAL, SPECIAL AND PUNITIVE DAMAGES SHOULD NOT BE AVAILABLE TO A PLAINTIFF HARMED BY A BASIC POLICY DECISION OF LOCAL GOVERNMENT. HOWEVER, SUCH A PLAINTIFF SHOULD NOT BE LEFT REMEDILESS. HE SHOULD ENJOY THE TRADITIONAL REMEDY OF HAVING SUCH OFFICIAL POLICY DECLARED INVALID AS AN UNREASONABLE EXERCISE OF POWER.

SINCE MAHER VS. GAGNE WAS DECIDED LAST YEAR NO SETTLEMENT OF SECTION 1983 LITIGATION CAN OCCUR UNLESS ATTORNEY'S FEES ARE PAID. EINSTEIN ONCE OBSERVED THAT THE TWO MAJOR PROBLEMS IN OUR CENTURY HAVE BEEN THE CONFUSION OF AIMS AND THE PERFECTION OF MEANS. THE MEANS AND AIMS OF THE ENGLISH SYSTEM, AND, FOR THAT MATTER, THE NIMLO PROPOSAL ON ATTORNEY'S FEES, SEEM MORE PERFECTED AND LESS CONFUSED THAN SECTION 1988, MAHER AND THEIR PROGENY.

SHOULD YOU HAVE ANY QUESTIONS, I WILL TRY TO ANSWER THEM TO THE BEST OF MY ABILITY.

Senator HATCH. We appreciate all witnesses who have been here, and we are trying to arrive at an appropriate solution legislatively to these problems, and it is not an easy thing to do, as I think has been evidenced by testimony from both sides here today.

Thank you for your efforts. With that, we will recess the subcommittee until our next hearing.

[Whereupon, at 11:20 a.m., the hearing was recessed, to reconvene at a later date.]

MUNICIPAL LIABILITY UNDER 42 U.S.C. 1983

THURSDAY, JULY, 23, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 9:45 a.m., in room 5110, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Thurmond and DeConcini.

Staff present: Stephen Markman, general counsel; Peter Ormsby, professional staff member; and Claire Greif, clerk.

Senator HATCH. The subcommittee will come to order.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

The Subcommittee on the Constitution today continues to consider the current status of State and local government liability under 42 U.S.C. 1983. Section 1983, originally the Civil Rights Act of 1871, was passed during the post-war reconstruction era to protect newly freed blacks from violations of rights secured by the "Constitution and Laws." The Civil Rights Act of 1871 has been extremely important in providing a remedy for individuals whose constitutional or civil rights have been violated under the color of State law.

I feel that section 1983 should continue to play that important role, but I also feel strongly that recent developments in section 1983 litigation are creating tremendous burdens on State and local government which cannot be justified as civil rights protection.

Section 1983 was significantly expanded as a result of two Supreme Court decisions last summer: *Maine* v. *Thiboutot* and *Owen* v. *City of Independence.* Earlier this year, I introduced S. 584 and S. 585 to respond to those decisions.

The result of *Thiboutot* was that section 1983, formerly called the Ku Klux Klan Act, now makes local governments potentially liable for violation of any Federal statute ranging from noxious weed control to strip mining, regardless of whether it pertains to civil rights. State and local governments now bear the entire burden of liability for statutory violation even when Federal officials are equally involved in a particular program.

After the decision in *Owen,* local governments cannot claim a good faith defense even when they neither knew nor should have known that their action violated the Constitution. In other words, a municipality must not only consider whether its actions may violate anyone's constitutional rights, but the municipality must also predict the future course of unsettled areas of constitutional law. Most judges could not do this. *Owen* is sure to have an adverse impact on municipal decisionmaking.

The effect of these decisions is compounded by the results of the Civil Rights Attorney's Fee Awards Act of 1976, which provides attorneys' fees to the prevailing plaintiff in any section 1983 action. The Fees Act, codified as 42 U.S.C. 1988, was intended for the laudable goal of providing poor people with the ability to attract competent counsel to enforce their constitutional rights, but there is evidence that the court's overly generous application of section 1988 has resulted in too much incentive for the bringing of suits under section 1983, which may be questionable at best.

The subcommittee will continue to consider the effect of awarding attorneys' fees in section 1983 cases and whether section 1988 should be modified to reduce the burden on State and local governments.

On June 25, the Supreme Court decided *Middlesex County Sewage Authority* v. *National Sea Clammers*. The Court held, despite the fact that neither party mentioned section 1983, that the existence of express remedies in the two statutes in question precluded any remedy under section 1983. Opponents of S. 584 have suggested that *Sea Clammers* significantly cuts back on the decision in *Thiboutot* and thus makes S. 584 unnecessary. In my opinion, the opposite is true.

First, while *Sea Clammers* suggests that the Court may be aware of the burdensome liability imposed in *Thiboutot,* the criteria to be used to determine enforceable statutes under section 1983 was left open, other than denying a section 1983 remedy where a statute provides its own comprehensive enforcement scheme. Thus *Sea Clammers* could have little impact on the problems addressed in S. 584.

Second, the fact that section 1983 is in such a state of flux argues strongly for congressional clarification of its intention in passing the Civil Rights Act of 1871. I believe that Congress will be derelict if it continues to remain silent on the intended scope of section 1983 with the hope that the courts will eventually find the proper balance between the rights of the individual and the ability of State and local governments to serve the public.

The subcommittee is again privileged to have the benefit of excellent witnesses as we continue to consider the State and local government liability under section 1983 and, specifically, the bills S. 584, S. 585, and S. 990.

Senator Domenici, I apologize for being late, but I really had some work to take care of. In some ways, it has been overwhelming lately. I can imagine what it must be for you.

We are very pleased to have you with us today and look forward to taking your testimony.

STATEMENT OF HON. PETE V. DOMENICI, A U.S. SENATOR FROM THE STATE OF NEW MEXICO

Senator DOMENICI. Mr. Chairman, I think that with all that I have to do and with all that you have to do, our presence here today indicates that this is a terribly important issue. I have not been testifying very much during the last few months, but as a former mayor, I am very concerned about what is happening with respect to municipal liability.

I have talked to a couple of my mayors. There is one such mayor in a very small community who was probably the most significant local leader in that part of my State for years. Because of recent Supreme Court decisions expanding municipal liability, he has resigned. He was not willing to stay in office with the threats of lawsuits and the necessity of hiring counsel in a couple of situations.

Having been advised of the decisions and the facts developing as a consequence of judicial expansion of title 42, United States Code, section 1983, it was obvious to me that this was not the kind of situation that Congress would tolerate. I have spent a great deal of time with my staff analyzing this issue. I conclude that we must do something and do it as quickly as possible. Rather than go through my detailed testimony, I would ask you, Mr. Chairman—in light of your scheduling problems, and because you have some witnesses who have come a long way for the purpose of testifying before this committee—to include my testimony in the record.

I would indicate that there is excellent language in the dissenting opinions, in the two recent Supreme Court cases that I have cited. I really think that that should have been the law. Since the present law does not incorporate these, they give your committee and you some excellent reasoning for the drafting of amendments to the existing 19th century law.

With that, Mr. Chairman, I am going to ask that you make my statement a part of the record.

Senator HATCH. Without objection, the statement will be made a part of the record.

[Material follows:]

PRPEARED STATEMENT OF SENATOR PETE V. DOMENICI

Mr. Chairman, it is a pleasure for me to appear before your subcommittee today to express my support and views with respect to the proposed amendments to 42 U.S.C. Section 1983. From the outset, my interest in this legislation stems particularly from my experience as Chairman of the City Commission and ex officio Mayor of Albuquerque, New Mexico.

Recent state and federal judicial decisions have significantly expanded beyond its intended purpose, the coverage of Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. Section 1983. Specifically, in Maine v. Thiboutot, 448 U.S. 1 (1980), the Supreme Court last Term broadly construed Section 1983 to authorize suits redressing violations by state officials not only in cases of deprivation of constitutional and statutory equal rights but also with respect to rights created by any federal statute. In Owen v. City of Independence, 445 U.S. 622 (1980), the Court -- departing from the previous strict construction of that section -- broadly interpreted Section 1983 to impose strict liability on municipalities for constitutional violations rejecting any form of qualified immunity for municipalities.

Taken together, these decisions dramatically expand -- without firm legal and policy support -- the liability of state and local officials in such a way as to disturb the balance between the important public interests contemplated by the original legislation and the legitimate fiscal and administrative interests of state and local governments. As a former mayor, I am particularly concerned that this balance be maintained. In the face of the existing imbalance triggered by recent judicial activity, I am co-sponsoring legislation, pending in the Senate Judiciary Committee, which -- while not compromising the original intent of Section 1983 to protect the constitutional and statutory equal rights of an individual -- will effectively limit its reach.

The first bill, S. 584, is designed to amend Section

1983 by replacing the unqualified phrase "and laws" with more specific language "and by any law providing for equal rights of citizens or of all persons within the jurisdiction of the United States." In Maine v. Thiboutot, supra, the Court -- although broadly interpreting the phrase "and laws" to include all federal laws -- admitted that "legislative history does not permit a definitive answer" with respect to its construction and invited clarification from Congress. This amendment seeks to provide that clarification. It would limit the liability of local and state officials to actions clearly found to deprive citizens of rights secured by the Constitution and by those laws which provide for equal rights -- not for violations of any and all federal statutes. While protecting the intended civil and constitutional rights of individuals, this amendment to Section 1983 will prevent the harassment of state and local officials which would otherwise result from the unintended broader interpretation. It will also save countless dollars for state and local governments which would otherwise be required to defray the entire burden of liability for violations of statutory "civil rights" even when federal officials are involved equally with state officials in the administration of the affected program. Absent the amendment, literally hundreds of cooperative regulatory and social welfare enactments -- including management laws and grant programs -- may be affected.

The second bill, S. 585, provides that municipalities and other political subdivisions of a state shall have a good faith defense, or qualified immunity, in Section 1983 actions. This amendment is responsive to the Court's misdirected decision in Owen v. City of Independence, supra, and the more recent Supreme Court decision in City of Newport v. Fact Concerts, Inc., 49 U.S.L.W. 4860 (June 26, 1981), which admits that the "contours of municipal liability under § 1983...are currently in a state of evolving definition and uncertainty." This amendment seeks to provide additional certainty with respect to municipal liability under Section 1983.

Such immunity would still leave the municipality liable for bad faith or unreasonable constitutional deprivations. It would obviate, moreover, the need for costly damage judgments to be paid for by local and state governments where officials have acted in good faith but, because of strict liability, would be held liable. Finally, it would avoid the undesirable result of strict liability for municipalities described by the dissent in Owen v. City of Independence, 445 U.S. at 668-69:

> The Court now argues that local officials might modify their actions unduly if they face personal liability under § 1983, but that they are unlikely to do so when the locality itself will be held liable. Ante, at 655-656. This contention denigrates the sense of responsibility of municipal officers, and misunderstands the political process. Responsible local officials will be concerned about potential judgments against their municipalities for alleged constitutional torts. Moreover, they will be accountable within the political system for subjecting the municipality to adverse judments. If officials must look over their shoulders at strict municipal liability for unknowable constitutional deprivations, the resulting degree of governmental paralysis will be little different from that caused by fear of personal liability. Cf. Wood v. Strickland, 420 U.S., at 319-320; Scheuer v. Rhodes, 416 U.S., at 242. (Emphasis added.)

This amendment strikes an equitable balance between two very important considerations -- the constitutional rights of individuals and the ability of local governments to serve all the people. In so doing, it attempts to meet the undesirable policy consequences which, left unchanged, the existing law will cause.

The state of the law with respect to municipal liability under Section 1983 is clearly in present need of clarification by Congress. Two additional Supreme Court decisions involving municipal liability under Section 1983, handed down last month, underscore most recently the inadequacy of a piecemeal judicial construction of this legislation of the post-Civil War reconstruction era.

In City of Newport v. Fact Concerts, Inc. 49 U.S.L.W. 4860 (June 26, 1981), the Court -- after reviewing the legislative history of Section 1983 -- determined that Congress did not intend to abolish the doctrine of municipal immunity from punitive damages. Likewise in Middlesex County Sewerage Authority v. National Sea Clammers Association, 49 U.S.L.W. 4783 (June 25, 1981), without either party raising the issue, the Court determined that, where a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, Congress intended not only to foreclose implied private actions but also to supplant any other remedy which otherwise would be available under Section 1983. While welcome, these recent decisions point up the need for clear Congressional clarification and direction with respect to Congress' original intention in passing this legislation.

Absent Congressional action, these judicial decisions, and no doubt others, will continue the uncertainty concerning interpretation of Section 1983 and severely impair the ability of local and state governments to serve the people. This it will continue to do under the mistaken "guise" of protecting the constitutional rights of individuals. I am, accordingly, urging immediate action on these two amendments to Section 1983.

Senator HATCH. Thank you, Senator Domenici. We are very grateful to have you as a cosponsor of this legislation. We feel that we can go a long way with this legislation toward resolving some of the problems that are just monumental in our country. We appreciate your statement.

We are also happy to have Senator Gorton here today to introduce some of our witnesses. As a former top attorney general in this country and now a U.S. Senator, we are overjoyed to have you in the U.S. Senate and participating with us.

Before we begin, let me just step outside for one moment to speak with Senator Domenici concerning some very important matters.

[Recess.]

Senator HATCH. We will now be pleased to hear from representatives of the National Association of Attorneys General.

I would like to point out that although our previous hearings have mainly addressed muncipal liability, States are also facing a tremendous burden in section 1983 litigation, particularly with the awarding of attorneys' fees.

We are pleased to have the attorneys general from three different States with us today to give us the perspective of the States in this problem.

Mr. David L. Wilkinson, the attorney general of Utah, a dear friend of mine and representing a State that I just happen to be particularly fond of, has a great deal of experience in State and local government. He also is an accomplished lawyer. I am sure he will add greatly to our understanding of State and local government liability under section 1983.

Rufus Edmisten, the attorney general of North Carolina, with whom I am very familiar, was scheduled to be with us today. Unfortunately, he will not be able to be here. We are very pleased to have the deputy attorney general for legal affairs, Mr. James Wallace, Jr., to speak on behalf of Mr. Edmisten.

We are also pleased to have the attorney general of Washington, Ken O. Eikenberry, with us today. He is accompanied by Malachy R. Murphy, the deputy attorney general.

Above all, I am very pleased to have our colleague, Senator Gorton, to introduce them. I might mention that being a former attorney general, I think Senator Gorton might have an awful lot to say about the final outcome of this legislation.

I know that you have to leave the hearing, Senator Gorton, so we will hear from you first. Then we will hear from the attorney general from Washington, followed by the Utah attorney general, and finally Mr. Wallace. After all of you have testified, I would like to ask some questions.

STATEMENT OF HON. SLADE GORTON, U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator GORTON. Mr. Chairman, thank you very much for your hospitality.

I know that you will share with me the sentiment that after the pleasure of being elected to an office which one sought for oneself, the greatest pleasure in politics is to be succeeded in the office one is leaving by the person or candidate of one's choice. That was my experience in November 1980 when I was elected to this body. I was succeeded, through the wisdom of the people of the State of Washington, by Ken Eikenberry as attorney general of the State of Washington.

He came to that position from a broad and experienced background having served in the Federal Bureau of Investigation as the deputy prosecuting attorney, having a broad background in the private practice of law in the city of Seattle, and having served three terms in a very distinguished fashion in the State House of Representatives.

Since his inauguration as attorney general of the State of Washington, he has begun a distinguished career both within the State and as a part of the National Association of Attorneys General.

I should like to say as well that I have had an opportunity to read the testimony which he is about to submit to this committee. In addition to introducing him to you, I wish to associate myself with the remarks and with the policy judgments that he advises in connection with this most important legislation before your subcommittee.

It is perhaps carrying coals to Newcastle for me to purport to introduce to you your own attorney general, David Wilkinson, whom I met last November at an orientation session for new attorneys general in the State of Arizona.

He comes of course as a graduate of your own Brigham Young University, with the distinguished position of having been a Rhodes scholar, and also having a background in public law in your State, which obviously qualifies him very, very highly for the position which he now holds.

My friend, Mr. Eikenberry, is accompanied by Malachy Murphy, a deputy attorney general for the State of Washington whom I brought into the State service.

Their colleague, Mr. Edmisten, will be represented here by a deputy attorney general for the State of North Carolina for legal affairs, Jim Wallace.

With that, Mr. Chairman, if you will excuse me, I will go to another meeting and leave these gentlemen to you.

Senator **HATCH**. Senator Gorton, we are very happy to have had you here today. I think it is an honor to all of us that you have taken time out of your busy schedule to be with us. Lately, we are all just dying around here with some of the pressures, but it is certainly nice of you to be here.

Ken, we will turn to you.

STATEMENT OF KEN O. EIKENBERRY, ATTORNEY GENERAL OF THE STATE OF WASHINGTON AND REPRESENTATIVE OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, ACCOMPANIED BY MALACHY R. MURPHY, DEPUTY ATTORNEY GENERAL

INTRODUCTION

Mr. **EIKENBERRY**. Senator Hatch, as Senator Gorton leaves, may I express my appreciation for his introduction and acknowledge the courtesy and cooperation he has extended that made my transition into the job so much easier.

Mr. Chairman, on behalf of the National Association of Attorneys General, I want to thank you for this opportunity to add emphasis and perhaps some new bits of evidence to what the committee is accumulating on the need to revise sections 1983 and 1988 of title 42 of the U.S. Code. I want to express our appreciation to you, Senator, for introducing Senate bills 584 and 585 on this very important subject.

I am very mindful of the comments that you made in commencing this meeting and intend to skip through various parts of the written testimony that we are submitting for the record. In the interests of time and in view of your position already, I will just pick out a few points and perhaps shorten my statements.

Senator **HATCH**. I would appreciate that. I think it is in the interests of all that we summarize our testimony. All written statements will be put into the record following your oral presentations. That will leave a little bit more time for questioning. I think it is important that we build this record and try to cover as much of this as we can. If you can summarize, I would personally appreciate it.

Mr. **EIKENBERRY**. Very good, sir. I will begin my summary by way of saying that we have submitted our subcommittee report from the National Association of Attorneys General, which I think builds a very strong case with many case citations for changing this law.

The long and short of my purpose in speaking today is to simply say that the recent cases that have been coming from our Supreme Court suggest not that the problems are diminishing, but rather that the problems are there as seriously and extensively as they have been, and that they threaten an uncontrollable fiscal impact on States and municipalities.

In a case decided in May, *Parratt* v. *Taylor,* Justice Powell was right on the mark when he commented that section 1983 of title 42 has "burst its historical bounds." As a result of the cases that have come down even this year, I think it is safe to say that we cannot look to the courts to put those sections back within their historical bounds.

NAAG REPORT RECOMMENDATIONS

I would mention again that we do invite your attention to the report submitted to the National Association of Attorneys General by its ad hoc subcommittee studying the effects of that law, as well as the resolution adopted by the National Association approving that report and urging Congress to take appropriate steps to amend sections 1983 and 1988 for the purpose of alleviating the serious fiscal liability that now confronts State and local governments today.

RECENT SUPREME COURT DECISIONS

The first case that I would mention, which is new, is *Middlesex County Sewage Authority v. National Sea Clammers,* decided by the Supreme Court on June 25 of this year, and reported at 49 Law Week, page 4783. There is a dialog that occurs in the course of that opinion that suggests that the underlying problem we are dealing with here continues to go on. The dialog is between Justice Powell, writing for the majority, and Justice Stevens, writing for himself and Justice Blackmun, concurring in the judgment but dissenting in part.

In the majority opinion, Justice Powell engages in a discussion of the impact of section 1983 on citizens' rights to sue for pollution damages and for ocean dumping under the Marine Protection Research and Sanctuaries Act of 1972.

Justice Powell concludes that in 1972 Congress had foreclosed any private remedy under 1983. Justice Stevens, on the other hand, concludes that Congress did not withdraw the express remedy which it provided to the citizens in originally enacting 42 U.S. Code 1983. Because Justice Stevens could find no clear congressional mandate to withdraw the 1983 remedy otherwise available to the citizens, he dissented from that portion of the Court's opinion.

What this all means is that Justice Powell felt that in the year 1871, in enacting a law designed to enforce the antidiscrimination laws, an act originally called the Ku Klux Klan Act, Congress might possibly have intended to grant to the citizens a cause of action against the States and municipalities, in Federal court, for damages arising out of those States and municipalities dumping sewage 20 miles off the coast of New Jersey.

On the other hand, Justice Stevens seems absolutely certain that Congress in 1871 intended to grant such a cause of action, and that the Congress 101 years later did not provide the courts with any clear mandate to withdraw that express right.

The suggestion that Congress originally intended to create such a statutory cause of action and that such actions on the part of the States and municipalities and their offices and agents might have been within the ambit of the original 1871 Civil Rights Act is, in my view, simply ludicrous.

NEED FOR CONGRESSIONAL ACTION

The mere fact that such a dialog could have taken place in an opinion rendered by the Supreme Court leads me to conclude that the States and their political subdivisions simply can no longer rely on the Court to provide any real moderating effect in this area, and it is now time for Congress to act and provide the Court with the clear mandate which it appears to be seeking.

In the statement I am submitting, there are two other cases we talk about which go in the same general vein, that is contrary to what some people who may have appeared before this subcommittee in the past suggest: that rather than contracting the area of exposure and liability, the area is expanding. If it is to be reduced or contracted at all to the logical area that should be covered, it will take an act of Congress.

I will skip over those two other cases that we talk about because there is one last point that I would like to suggest. That is that we can all agree that 1983 was originally enacted by the 1871 Congress to enforce the antidiscrimination laws and constitutional protections of the post-Civil War era.

Indeed, for 109 years, it was generally assumed that the words "and laws" meant laws intended to enforce the constitutional freedoms of the citizens. Yet in *Maine* v. *Thiboutot*, the June 1, 1980 watershed case, the Court decided that phrase also included the Social Security Act, a law enacted pursuant to Congress' power under the commerce clause as well as its general spending power. Therein lies the rub.

RECOMMENDED AMENDMENTS

In summary, Mr. Chairman, we are proposing that even beyond the revisions made by Senate bills 584 and 585 the law should be specifically written to cover situations of willfulness, the law should be written so as to cover damages, and the law should be written so that it applies to civil liberties pursuant to the 14th amendment to the Constitution.

Senator HATCH. Thank you, General Eikenberry.

Mr. Wilkinson?

[The prepared statement of Mr. Eikenberry follows:]

PREPARED STATEMENT OF KENNETH O. EIKENBERRY

Mr. Chairman and Members of the Subcommittee,

To begin, I'd like to thank the Chairman for holding these hearings today, and affording me, as well as other member of the National Association of Attorneys General, the opportunity to testify in this very important area to the states. Additionally, I would like to express my appreciation to Senator Hatch for introducing S. 584 and S. 585.

While seemingly uncomplex on their face, those bills deal with a problem of increasing complexity facing the states and municipalities, which, if not solved by the Congress, threatens an almost uncontrollable fiscal impact on the states and municipalities. In Parratt v. Taylor, Justice Powell described 42 U.S.C. § 1983 as having "burst its historical bounds." As a result of this judicial bursting, the states and their municipalities cannot look to the courts for any reasonable interpretation of the limits of § 1983.

Furthermore, the Court, in almost each case, points to the Congress as having intended to "grant" a cause of action for damages based on "rights," now purely statutory, which it is inconceivable to me could be encompassed within the intent of the 1871 Congress which originally enacted this law. That, coupled with the absolute unwillingness of an increasing number of courts to exercise any restraint in awarding attorneys' fees under 42 U.S.C. § 1988, has created a situation which only the Congress can now effectively and intelligently deal with. Obviously, this subcommittee recognizes that situation and is willing to deal with it, and I heartily endorse your efforts in doing so.

I know that the time of the subcommittee is limited, and that the attention of the members is naturally focused on other areas of grave significance to this country. I am also aware of the earlier hearings which the subcommittee has held on these bills, and of the general efforts of the subcommittee, and its staff, to fully acquaint themselves with the problems related to the current judicial interpretations of 42 U.S.C. §§ 1983 and 1988, and to settle upon an appropriate Congressional response to the problem. I am sure, for example, that you need no further eludication from me as to the meaning and potential impact of Maine v. Thiboutot. I thus do not intend to engage in any lengthy discussion of the background and the reasons for the problems we are now facing. In that respect, however, I do want to call your attention to a report to the National Association of Attorneys General by its Ad hoc Subcommittee To Study The Effects Of 42 U.S.C. §§ 1983 and 1988, as well as to the Resolution adopted by the National Association endorsing S. 584 and S. 585, and urging the Congress to take appropriate steps to amend §§ 1983 and 1988 for the purpose of alleviating the serious fiscal liability that now confronts state and local governments, which was adopted by the Association at our recent annual meeting.

I understand that both this report and the Resolution have already been made available to the members of the subcommittee, but I am nevertheless submitting them again to you today. I particularly commend the report of our 1983 subcommittee, to your attention, along with the recommendations contained at the conclusion of that report.

I will briefly discuss three of the most recent cases decided by the United States Supreme Court in this area, however, since they both highlight the extent of the problem we are now facing, and because two of those cases prompt, I submit, serious consideration of further amendment to 42 U.S.C. § 1983 not already contained in S. 584 or S. 585.

First, I would like to call to your attention very briefly Middlesex County Sewage Authority v. National Sea Clammers Association, decided by the Supreme Court on June 25, 1981 and reported at 49 Law Week, page 4783. In that opinion is found a very interesting, while extremely disturbing, dialogue between Justice Powell, writing for the majority, and Justice Stevens, writing for himself and Justice Blackman concurring in the judgment but dissenting from a portion of the opinion.

In the majority opinion, Justice Powell engages, sua sponte, in a discussion of the impact of § 1983 on citizens' rights to sue for pollution damages caused by discharges which may or may not be unlawful under the Federal Water Pollution Control Act Amendments of 1972, and for ocean dumping which may or may not have been prohibited by the Marine Protection Research and Sanctuaries Act of 1972. Justice Powell, again even though the parties had not even suggested the existence of the argument, concludes that in 1972 Congress had "foreclosed" any private remedy under § 1983. Justice Stevens, on the other hand, concludes that Congress did not "withdraw" the "express remedy" which it provided to the citizens in originally enacting 42 U.S.C. § 1983. Because Justice Stevens could find no "clear Congressional mandate" to withdraw the § 1983 remedy otherwise available to the citizens, he dissented from that portion of the Court's opinion.

What this all means, of course, is that Justice Powell felt that in 1871, in enacting a law designed to enforce the anti-discrimination laws (an act originally called the Ku Klux Klan Act), Congress might possibly have intended to "grant" to the citizens a cause of action against the states and the municipalities, in federal court, for damages arising out of those states or municipalities dumping sewage twenty miles off the coast of New Jersey. Justice Stevens, on the other hand, seems absolutely certain that Congress in 1871 intended to grant such a cause of action, and that the Congress, 101 years later, did not provide the courts with any "clear mandate" to withdraw that express right. The suggestion that Congress originally intended to create such a statutory cause of action, and that such actions on the part of the states and municipalities, and their officers and agents, might have been within the ambit of the original 1871 Civil Rights Act, is simply, in my judgment, ludicrous. The mere fact that such a dialogue could have taken place in an opinion rendered by the Supreme Court leads me to conclude that the states and their political subdivisions simply can no longer rely on the Court to provide any real moderating effect in this area, and it is now time for Congress to act, and to provide the Court with the "clear mandate" which it appears to be seeking.

Secondly, the Court's decision in Parratt v. Taylor, decided May 18, 1981 and reported at 49 Law Week, page 4509, prompts, in my judgment, a need for a further amendment to § 1983. In that case, the Court held that a Nebraska inmate, whose $23.50 hobby materials had been negligently lost by the officials of the Nebraska Penal and Correctional Complex, did not state a cause of action under 42 U.S.C. § 1983; not because no right of action based on negligence came within the statute, but because his property had not been denied "without due process" in view of the fact that the State of Nebraska affords the prisoner potential relief under its Tort Claims Act. The disturbing holding, of course, of that case is the one just alluded to. That is, the Court has concluded that when an individual is "deprived of property" because of the negligent, unintentional, nonwillful actions of the officers or agents of a state or political subdivision, that negligence could give rise to a federal cause of action for damages, along with the now virtually automatic award of substantial attorneys' fees under 42 U.S.C. § 1988, unless the state or political subdivision affords that individual due process through some statutory availability of a remedy.

When viewed in that light, for example, it becomes clear that the Court may indeed have, perhaps inadvertently, rendered unconstitutional any attempt on the part of the states to limit their liability through the exercise, or reimposition, of sovereign immunity. If, for example, the State of Nebraska had determined, in the management of its own fiscal affairs, to withdraw from its inmates the right to sue the state for damages because of the negligent acts of the prison authorities, any "deprivation of property" arising out of such negligence not only falls within the ambit of the Fourteenth Amendment, but also within 42 U.S.C. § 1983. Again, I submit that such a suggestion with respect to a statute originally enacted to enforce the post-Civil War anti-discrimination laws is simply absurd. For that reason I now urge the subcommittee, and Senator Hatch, to further amend § 1983, by adding appropriate language to S. 584 making it clear that a cause of action exists only for the wilful and intentional actions of the states, political subdivisions, and their officers, agents or employees.

At the conclusion of this statement, I will provide language which in my view achieves that result.

Thirdly, I am heartened by the Supreme Court's June 26 decision in City of Newport v. Fact Concerts, Inc., 49 Law Week, page 4860. In that case the Court held that municipalities themselves were not subject to punitive damages under § 1983. That does not solve the entire potential problem in this area, however. It is not at all clear from that opinion that an individual municipal officer, or state officer for that matter, acting pursuant to state law, would not be subject to punitive damages under that section.

We all here know that except in the rarest of circumstances, the states and cities and counties of this country undertake to immunize their officers and employees from these damages by defending and paying judgments entered against their officers for conduct undertaken in the official performance of their duties. It will be a small comfort to my state, for example, if when the treasurer is required to execute a warrant in favor of some successful private litigant for exorbitant punitive damages, for me to explain to him that the State of Washington itself really did nothing wrong. Thus, I again suggest a further refinement of the amendments to § 1983 to clearly preclude the award of any punitive damages against any defendant, be it the state, a municipal or an officer or employee thereof.

It has come to my attention that certain opponents of this legislation have taken the position, apparently in testimony before this subcommittee given on July 8, that after the _Middlesex County_ case, coupled with _Pennhurst State School v. Halderman_, decided by the Supreme Court on April 20, 1981 and reported at 49 Law Week, page 4363, § 1983 does not pose the same threat to the fiscal integrity of the states and their political subdivisions as may have previously been suspected. The suggestion was made, for example, that after the _Middlesex County_ and _Pennhurst_ cases, a "two-tiered" test has now been established by the Supreme Court before any plaintiff can demonstrate his or her right to relief under that section. Their position apparently, as I understand it at least, is that a litigant must now show not only that the statutory scheme involved was of the kind that created enforceable "rights" under § 1983, but also that Congress had not foreclosed private enforcement of that statute by the enactment of a separate enforcement scheme in the statute itself.

Simply put, I do not subscribe to the suggestion that in the Middlesex County and Pennhurst cases the Supreme Court has so limited the application of § 1983 as to solve the problems facing the states and its municipalities.

If the same court can find, for example, that the negligent loss of $23.50 worth of hobby materials by prison authorities and inmate workers in a mail room constitutes such a deprivation of property as to give rise to a 42 U.S.C. § 1983 cause of action, then I do not feel confident in relying upon the Court's further ability to moderate the impact of this statute. Understandably, I also submit that this subcommittee, and the Congress, should not so rely either.

Two final points with respect to § 1983. They concern the appropriate scope of that act, when again viewed in its historical context.

We can all agree that § 1983 was originally enacted by the 1871 Congress to enforce the anti-discrimination laws and constitutional protections of the post-Civil War era. Indeed, for 109 years it was generally assumed that "and laws" meant laws intended to enforce the constitutional freedoms of the citizens. Yet, in Thiboutot, the Court decided that phrase included the Social Security Act, a law enacted pursuant to Congress' power under the Commerce Clause. And therein lies the rub!

In order to get § 1983 back where it belongs, as a statute designed to allow citizens to protect their cherished Fourteenth Amendment freedoms, Congress should promptly, and explicitly, remove from its ambit any laws enacted pursuant to the Commerce Clause, or Congress' general spending power. I am satisfied S. 584 is intended to do just that. I simply suggest that that be made inarguably clear, perhaps by the inclusion in the committee report of appropriate language to that effect.

It seems also clear to us that the courts are confusing two entirely separate concepts: Having a cause of action for damages under § 1983, and access to the federal courts. General federal court § 1343 type jurisdiction would still exist, for example, if § 1983 were repealed entirely. Ms. Thiboutot could have obtained a mandatory injunction. from the federal court, ordering the State of Maine to pay her the benefits to which she was entitled, if § 1983 had never been enacted. What she would not have been able to obtain, and will not, if this legislation is enacted, is damages, and an award of attorneys' fees of several thousands of dollars in excess of the "damage" she suffered. And, of course, the citizens' rights to sue their state or local governments in the state courts, under state laws, will not at all be affected.

I do want to say a word about the serious problem facing us all under the Civil Rights Attorneys' Fee Act of 1976, 42 U.S.C. § 1988.

That act, perhaps, costs us more money in attorneys' fees than § 1983 costs us in actual damages. Again, I suggest that the courts have extended the implication of that act far beyond what Congress intended in enacting it in 1976, and have been completely unable or unwilling to exercise any restraint in the amount of money they are willing to award to "successful" attorneys. I realize that neither S. 584 nor S. 585 deal with that area, but I do want to express to the subcommittee our extremely serious concern regarding the impact of § 1988.

It is my understanding that the committee will be dealing with that problem when appropriate legislation is drafted and introduced. I want to make clear at this point our endorsement and support of any Congressional effort to provide some moderation in this area, to express my willingness and the willingness of the National Association of Attorneys General, to work closely with the Congress in developing and enacting such legislation. Again, in that regard, the report of the NAAG subcommittee to which I referred earlier deals at some length with the attorneys' fee problems and contains some specific legislative recommendations. I commend those recommendations to your attention, and look forward in the future to working with you with a view toward incorporating them, or similar provisions, into law.

Lastly, I should make clear my obvious opposition to S. 990. That will, unlike S. 584 and S. 585, vastly expand § 1983 liability, along with, of course, the attendant attorneys' fees awards, rather than contract that liability. Such an appproach is entirely unsound and unwarranted. The potential fiscal impact of that bill is enormous. I am unalterably opposed to its passage. It would cast in concrete what we strongly urge the Congress to discard; that is the tendency of the Court to turn § 1983 into a general, federal tort law for use against the states and municipalities.

In conclusion I again quote Justice Powell. In footnote 13 at the conclusion of his concurring opinion in Parratt v. Taylor, he says, ". . . In view of increasing damages-suit litigation under § 1983, and the inability of courts to identify principles that can be applied consistently, perhaps the time has come for a revision of this century-old statute--a revision that would clarify its scope while preserving its historical function of protecting individual rights from unlawful state action." I disagree with only one of the Justice's words. There is no "perhaps" about it. The time has indeed come for Congress to limit the scope of this law, as well as to moderate the impact of attorneys' fee awards under §§ 1983 and 1988.

Thank you, Mr. Chairman, for the opportunity to appear and express my views here today. I would, of course, be more than happy to answer any questions which you or the members of the subcommittee might have.

SUGGESTED AMENDMENT TO S. 584

It should read as follows:

That § 1979 of the revised statute (42 U.S.C. § 1983) is amended by inserting between the words "Territory" and "subjects" the word "willful"; by striking out "and laws" and inserting in lieu thereof the following: "And by any law providing for equal rights of citizens or of all persons within the jurisdiction of the United States"; and by inserting after the words "shall be liable" the words "for actual damages only."

HISTORY OF 42 U.S.C. § 1983

42 U.S.C. § 1983 was first enacted in 1871 as part of the Civil Rights Act of 1871 (the Ku Klux Klan Act). Its purpose to nullify the Black Codes (enacted in southern states to curtail the freedom of former slaves), to protect voting rights, to suppress the Ku Klux Klan and to secure equal treatment in public accommodations. *D. Howard, I'll See You In Court: The States And The Supreme Court, National Governors' Association Center For Policy Research, Washington, D.C. (1980) [hereafter Howard]*. The statute was enacted to respond to lawlessness in many of the southern states, and to enforce the Fourteenth Amendment.

42 U.S.C. § 1983 presently reads:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

For several decades after the passage of § 1983, the courts limited its application to cases of discrimination, reflecting the historical concerns surrounding its origin. *Howard*. The scope of § 1983 began to be enlarged by *Hague v. C.I.O.*, 307 U.S. 496 (1939), which affirmed an injunction against city officials who, acting under a local ordinance, had been interfering with the organizing efforts of labor unions. In Monroe v. Pape, 365 U.S. 167 (1961), (unreasonable search by police), the court further extended § 1983's scope by holding that even though an adequate state remedy existed which an injured party might invoke, the federal remedy is supplementary and the latter need not be first sought and refused before § 1983 is invoked. The Monroe court did limit § 1983, however, by concluding a municipality was not a "person" for purposes of § 1983 and thus could not itself be sued under the statute.

This immunity of municipalities from liability under § 1983 was abrogated by Monell v. Department of Social Services, 436 U.S. 658 (1978), (discrimination against pregnant employees); which held that municipalities were "persons" subject to liability under § 1983. The Monell court said local governing bodies could be sued directly for monetary, declaratory, or injunctive relief where the action alleged to be unconstitutional implemented a policy statement, ordinance, regulation, or decision officially adopted by that body's officers, or where constitutional deprivations were visited pursuant to governmental "custom," even though such custom had not received formal approval through the body's decisionmaking channels. Thus today municipalities are directly liable under § 1983.

A state, however, is not a "person" liable to suit under § 1983. Quern v. Jordan, 440 U.S. 332 (1979), (state officials required to give notice of denial of welfare benefits). The Quern court felt that while the legislative history of § 1983 indicated an intent to subject municipalities to liability, there ws insufficient evidence that Congress had intended to abrogate the Eleventh Amendment immunity of states from suit in federal court, and that the term "person" should thus not be construed to include a state.

Equitable relief is available against a state under § 1983, however, when the rule of Ex parte Young, 209 U.S. 123 (1908), is applied. The Young court's ruling that the unconstitutional act of a state official can be enjoined effectively results in an injunction against the state itself since a state can act only through individuals. Thus, applying the logic of Young, states can be reached under § 1983 through injunctive actions[1] against state officials acting in their official capacity.

It can be seen that the evolution of § 1983 from 1871 to 1979 has resulted in direct liability of municipalities and indirect liability of the states through its officials for any constitutional deprivation imposed by the governmental entity. In 1980, however, the scope of § 1983 was drastically enlarged.

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[1] While as yet the court has not sanctioned § 1983 actions for damages directly against states as "persons," the fiscal effect of such injunctive actions can be catastrophic, since the programatic costs of complying with the relief ordered can, and often does, run into the tens and hundreds of millions of dollars. To this, must, of course, be added the liability for attorney fees to "prevailing" parties.

In Maine v. Thiboutot, 100 S.Ct. 2502 (1980), (state had wrongly denied a family welfare benefits), the court held plaintiffs could use § 1983 to seek redress of claims based on federal statutes generally, where no "discrimination" was involved, and where the statute (in that case the Social Security Act) was not enacted pursuant to, or in order to enforce, the Fifth or Fourteenth Amendments.[2] The Thiboutot majority looked only at the language of the statute and found that the phrase "and laws" encompassed claims based on purely statutory violation of federal law. Justice Brennan, writing for the majority, felt that the absence of legislative history as to the meaning of "and laws" indicated a congressional intent to include all federal laws within the scope of § 1983.

Justice Powell in dissent argued strenuously in opposition to this interpretation and eloquently pointed out myriad potential abuses associated with the majority's interpretation. Justice Powell felt the practical effect of interpreting "and laws" to include all federal laws inevitably would lead to saddling state and local governments, officers and employees with liability for tort-like damages whenever a person believed he or she had been injured by the administration of any federal-state cooperative program, whether or not that program was related in any way to civil or constitutional rights; in other words, whenever a statutory benefit or "entitlement" was withheld or denied, regardless of the fact that the plaintiff (or class) had no constitutional right to receive the benefit in the first place. Justice Powell felt such a broad and all encompassing interpretation was inconsistent with the original purpose of the Civil Rights laws, and would result not only in great potential liability for the state,[3] but also in the federal courts overseeing a broad range of state and local activities, what he called a "major new intrusion into state sovereignty," and "the pervasive judicial oversight of state officials." 48 U.S.L.W. 4868.

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[2] The Thiboutot impact, along with Mahre v. Gagne, 448 U.S. ___, on attorneys fee awards under 42 U.S.C. § 1988 will be discussed infra.

[3] For an enlightening (frightening?) discussion of the potential for increased state and local liability because of the immunity of federal officials involved in these "cooperative" programs, see 48 U.S.L.W. at 4865 and note 10.

In the fifty years following the passage of § 1983 (1871 to 1920) only 21 cases were brought under § 1983, and all dealt with racial discrimination. After Hague v. C.I.O., 307 U.S. 496 (1939), which extended the scope of § 1983 beyond racial discrimination, the number of suits grew each year until there were 300 in 1960. The number of § 1983 suits has reached epic proportions during the 20-year period since Monroe v. Pape. In 1976, out of a total of 56,822 federal question cases filed in the district courts, 17,543, almost one-third, were civil rights suits claiming constitutional protection against state and local officials.[4] Howard. Now, with the ruling in Thiboutot that § 1983 applies to all federal laws, the states and municipalities can expect the number of suits against them to increase dramatically. This dramatic increase in § 1983 litigation, coupled with almost certain § 1988 attorneys' fees being awarded to successful plaintiffs,[5] may result in the states facing crippling financial liability due to an ever-broadening interpretation of § 1983.

HISTORY OF 42 U.S.C. § 1988

The general rule regarding attorneys' fees, the "American Rule," is that attorneys' fees are not ordinarily recoverable by the prevailing litigant in federal litigation in the absence of specific statutory authorization. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). Prior to 1976, 42 U.S.C. § 1988 did not specifically provide for an award of attorneys' fees. Congress passed the Civil Rights Attorneys' Fees Awards Act of 1976 in direct response to the rule enunciated in Alyeska. The amended § 1988 now allows a court, in its discretion,[6] to award attorneys' fees to a prevailing party in suits brought to enforce certain civil rights acts:

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[4] New filings remained relatively consistent through 1979. If prisoners' claims are included, the number of filings that year rose to 24,591. Annual Report of the Director of the Administration of the United States Courts, 6, Title 6 (1979).

[5] Success, for purposes of § 1988, does not even require establishing that any federal rights, statutory or constitutional, were infringed. It merely requires "prevailing," on any theory, even though non-federal, settling, or having the issue mooted by factors at play entirely outside the litigation involved. See, p. 8, infra.

[6] This "discretion," in the view of the Supreme Court and Courts of Appeal, is illusory. See, p. 7, infra.

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of American, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988.

The legislative history of the Fees Act states that the Eleventh Amendment would not be a bar to the award of counsel fees against State governments. The House Judiciary Committee Report cites Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), (fees allowed under 42 U.S.C. § 2000C, et seq.), which held that Congress has the power under § 5 of the Fourteenth Amendment to authorize federal courts to award fees against the state as a means of enforcing the Amendment's substantive guarantees. In Hutto v. Finney, 437 U.S. 678 (1978), (prison conditions constituted cruel and unusual punishment), the court upheld a § 1988 fees award against the state of Arkansas, employing the same rationale used in Fitzpatrick. Thus, the history of § 1988 along with Hutto makes it clear that a state may be liable to a prevailing plaintiff for an award of attorneys' fees under § 1988.

In fact, there may be little a state can do to avoid attorneys' fees liability, short of prevailing in the suit. The Courts have interpreted the legislative history of § 1988 to warrant a presumption that counsel fees should ordinarily be awarded unless special circumstances render the award unjust.[7] Bunn v. Central Realty of Louisiana, 592 F.2d 891 (5th Cir. 1979). The strong presumption in the 1976 legislation is based on the "Newman-Northcross" doctrine which arose from two Supreme Court decisions. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968), Northcross v. Memphis Bd. of Ed., 412 U.S. 427 (1973).

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[7] It is important to note that "ability to pay" was expressly excluded by the Bunn court from being a special circumstance.

As a further obstacle to the states, the Fifth Circuit has held that a defendant's conduct, whether in good faith or bad, is irrelevant to an award of attorneys' fees once it has been determined plaintiff's civil rights have been violated. Brown v. Culpepper, 559 F.2d 274 (5th Cir. 1977). Even though the Fifth Circuit later limited this principle to defendants guilty of invidious discimination in Henderson v. Fort Worth Independent School District, 574 F.2d 1210 (5th Cir. 1978), the Supreme Court has restated it more forcefully regarding municipalities in Owen v. City of Independence, 100 S.Ct. 1398 (1980). The Owen court held that a municipality could not assert the good faith of its officials when sued under § 1983 for violations of constitutional rights. If this trend continues, states and municipalities will be unable to defend against § 1988 fee claims or limit fee awards to prevailing plaintiffs based on an unintentional infringement of civil rights. In essence, an Owen trend would result in imposing a strict vicarious liability on municipalities, and perhaps even states. (See, dissenting opinion of Powell, J., in Owen.)

Another troublesome trend in the decisions is that the courts are allowing "prevailing" plaintiffs to recover attorneys' fees even if a § 1983 claim has not been litigated. In Maher v. Gagne, 100 S.Ct. 2570 (1980), (AFDC regulations), the court grantd an award of § 1988 fees against the state of Connecticut upon settlement of a § 1983 action in which "substantial" Constititonal violations were alleged but not adjudicated. The Maher court reasoned that a plaintiff "prevails" by negotiating a favorable settlement, and determined that an award of fees following a consent decree was appropriate in the exercise of the enforcement powers of § 5 of the Fourteenth Amendment, if that, or any other constitutional provision, was involved in the complaint, even though no violation was found. In Ross v. Horn, 598 F.2d 1312 (3rd Cir. 1979), the court indicated that even if the plaintiff does not obtain a formal decree and even if a formal judgment of dismissal is entered for the defendant, the plaintiff may nonetheless be entitled to fees if the lawsuit acted as a "catalyst" for changing defendant's practices. Thus, a plaintiff may not even have to argue his case to be entitled to an award of attorneys' fees.[8]

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[8] At least one District Court has held that plaintiffs are entitled to an award of fees when they "prevail" because a freeway project is dropped for reasons having nothing whatsoever to do with a § 1983 claim, thus mooting the litigation. See, Southeast Legal Defense Fund v. Adams, infra, p. 9; and Bly v. McCloud, ___ F.Supp. ___.

The courts have even gone so far as to award § 1988 fees to a plaintiff who prevailed on a non-§1983, non-federal claim, so long as a "significant" § 1983 claim is alleged. In Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978), (prisoner treatment), the court said a plaintiff need prevail on only one significant issue to be entitled to attorneys' fee awards. In Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974), aff'd 550 F.2d 464 (9th Cir. 1977), rev'd on other grounds 98 S.Ct. 525 (1978), the court refused to separate non-fee claims from fee claims for purposes of calculating attorneys' fees. The Zurcher court said fees should be granted for all legal work reasonably calculated to advance plaintiff's interests. Other courts have found that if the non-fee claim is dispositive and the fee claim involves a constitutional question which the court is reluctant to resolve, fees may be awarded as long as the undecided § 1983 claim meets the "substantiality" test, and the non-fee claim on which plaintiff prevails arises out of a "common nucleus" of operative fact." Seals v. Quarterly County Court, 562 F.2d 390 (6th Cir. 1977); Southeast Legal Defense Group v. Adams, 436 F.Supp. 891 (D. Ore. 1977); and White v. Beal, 447 F.Supp. 788 (E.D. Pa. 1978).

The result of this line of cases, of course, is the appearance of § 1983 claims in virtually any action against public officials. This impact will increase drastically after Thiboutot, a fact recognized clearly by Justice Powell in his dissent.

The development of § 1988 and the potential trouble it spells for the state can be illustrated by principles enunciated by two courts. In LaRaza of S. Alameda County v. Volpe, 440 F.Supp. 904 (N.D. Cal. 1977), the court held that § 1983 need not even be pleaded in order to award attorneys' fees under § 1988! The LaRaza court felt a judicial finding that the state had deprived the plaintiff of rights, privileges or immunities secured by federal law is sufficient to imply a § 1983 action and thus make possible an award of attorneys' fees under § 1988.[9] Finally, some courts have awarded additional fees against defendants who have contested the initial fee award. See, Torres v. Sachs, 69 F.R.D. 343 (S.D. N.Y. 1975); Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974).

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[9] See also, White Mountain Apache Tribe v. Bracker, 48 U.S.L.W. 4897 (1980), infra, p. 16.

Thus, from the above discussion, it can be seen the potential for liability of the states for attorneys' fees is immense. Applying the principle of Thiboutot, (that plaintiffs can recover under § 1983 for any violation of any federal law) along with the principle of Owen, (that the good faith of defendant officers is irrelevant and cannot be asserted as a defense by the municipality (state in the future?)) makes Justice Powell's fear in Thiboutot about strict liability for the states appear ominous. In addition, if it is no longer necessary for plaintiffs to allege a § 1983 violation to recover fees under § 1988, LaRaza, and the states face possible additional attorneys' fees for contesting § 1988 awards, Torres, then strict liability for § 1983 defendants appears unavoidable, and the mitigation of § 1988 fees awards nearly impossible. It may become wiser for the states to consent to all fee claims rather than contest them, which would result in a limitation on the adversary process.[10] The present path of § 1983/1988 litigation quite possibly could be headed toward bankruptcy for state treasuries.

ILLUSTRATIONS OF § 1988 ABUSE

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[10] For an illustration of the problem consider Judge Browning's reasoning in Dennis v. Chang, 611 F.2d 1302 (1980):

> ". . . Similarly, while potential liability for attorneys' fees may encourage a state defendant to settle civil rights litigation that has been brought against it, if the state could immunize itself against a fee award by contributing to the financing of plaintiffs' counsel the state would have less incentive to settle pending litigation and more incentive to resist civil rights compliance be defending against the suit until trial."

The Court did not want to undermine what it called the "deterrent effect of a potential fee award." Thus it appears now to be national policy, at least recognized by one panel of the Ninth Circuit, that the states should be "deterred" from defending temselves to the point of seeking their own "day in court." Curious!

The biggest problem facing the states is the mass of litigation arising as § 1983/1988 claims. Since the Fees Act was passed in 1976, there have been at least 307 § 1983 suits reported in the national reporter system in which § 1988 attorneys' fees were also sought. An unusually high number of those suits resulted in plaintiffs prevailing (271). Of the prevailing plaintiffs, 212 were awarded attorneys' fees.[11] Sixty-nine percent (69%) of all suits resulted in attorneys' fees being awarded to plaintiffs. Seventy-eight percent (78%) of all prevailing plaintiffs were awarded attorneys' fees. Two hundred sixty-three (263) suits, or 86% of all the suits involved a governmental defendant. These figures do not take into account all the unreported cases which never made it past the trial court level. Those figures would be nearly impossible to ascertain at this point.

Recently, however, a questionnaire was circulated among the states to try and ascertain the number of currently pending § 1983 actions against the states, and if possible, potential § 1988 liability. The 25 states able to respond on the short notice given indicate in excess of 1,800 § 1983 cases currently pending.[12] Granted, some of these suits will be deemed frivolous, but if the percentages garnered from the reported cases (see above) are indicative of the courts' eagerness to allow plaintiffs to prevail on some issue so that attorneys' fees may be awarded, the states face immense financial liability.[13]

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[11] In most of the others we assume no fees were requested, or the court simply did not discuss that aspect of the case in the reported opinion.

[12] That figure does not include New York, California, Illinois, Pennsylvania, New Jersey or Michigan. When those populous states, as well as all others, are included, the magnitude of the problem will undoubtedly become even greater. Ohio and North Carolina, for example, each report over 600 pending cases.

[13] NIMLO recently circulated its own questionnaire to its membership of 1,654 municipalities. As of February 13, 1981, response were received from about one third (1/3) of the membership, and disclosed over three billion dollars in claims, exclusive of attorneys' fees! Even allowing for the percentage of frivolous claims (if there are any such claims left) and the inflated amount prayed for, the amount of "legitimate" claims, especially to the small states and municipalities is enough to choke the proverbial goat.

The policies underlying the Eleventh Amendment and the principles of federalism and sovereign immunity require portection of the states' fiscal integrity from private litigation. However, the courts, as discussed earlier, have adopted a cavalier attitude regarding the states' fiscal concerns, and plaintiffs' attorneys are taking advantage of that allousness. An example is *New York State Association for Retarded Children, Inc. v. Carey*, 72 C 356/357 (E.D. N.Y.), in which its attorneys seek an attorneys' fees award of $2,442,673.30. A consent decree was entered in the case, but the District Court entered an order permitting plaintiffs to receive some attorneys' fees. The motion for fees currently before the court seeks fees for eight attorneys, two law students, numerous non-legal experts (including their plane fares, hotel and restaurant bills, and in the case of one expert, his dog kennel expenses covering his trip to New York), secretarial costs, and even the costs of an "executive retreat" held by the attorneys at a mountain resort where they allegedly discussed the case.

There is often a disproportion between the amount of relief granted to plaintiff and the award of attorneys' fees. Florida, for example, reports $211,042 in judgments since 1976, but $778,090 in fee awards. In *Copeland v. Marshall*, 594 F.2d 244 (1978), (a non-1983 action alleging sex discrimination), the plaintiff class obtained relief in the amount of $31,345. Yet, the *Copeland* court awarded plaintiffs' attorneys, the Washington D.C. law firm of Wilmar, Cutler & Pickering, who had appeared *pro bono*, $160,000 in fees. In *Regina v. Dalsheim* (S.D. N.Y. 78 Civ. 1677) a private law firm brought a § 1983 action on behalf of a prisoner who alleged that he had been receiving inadequate medical treatment for his heart condition. Although the court rejected all of plaintiff's numerous challenges to the condition of the prison hospital and the treatment afforded by its doctors, it did direct the prison to install an electric buzzer over the plaintiff's bed to be used in case of an emergency! In light of that relief, the court awarded the attorney $13,383.22 in attorney's fees.[14] In *Thiboutot*, the "damages" involve approximately $2,500, while attorneys fees are expected to exceed $120,000.

Another problem for the states with § 1988 is the payment of attorneys' fees to legal service organizations and other agencies which are already publicly funded. In *Southeast Legal Defense Group v. Adams*, 436 F.Supp. 891 (D. Ore. 1977), the State of Oregon was ordered to pay of $240,000 award to a legal services organization. In Vecchione v. Wohlgemuth, 481 F.Supp. 776 (E.D. Pa. 1979), legal service attorneys representing patients in Pennsylvania mental health facilities succeeded in expanding the patients' rights with respect to the management of their property and consequently won an attorney's fee award of $203,100.

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[14] Reduced from the $112,839.62 requested.

In Dennis v. Chang, 611 F.2d 1302 (9th Cir. 1980), the Legal Aid Society of Hawaii (LASH) was awarded fees against the state, in spite of the fact that LASH was supported by the state through direct annual appropriations. That Court felt it was important that "even when funded by the state, legal services organizations operated on limited budgets and must allocate their resources among competing projects," ignoring entirely the fact that the same is true of the states. The court was also persuaded that "if the state were led to expect a reduction in its obligations because it had contributed funds to plaintiffs counsel, the deterrent effect of a potential fee award would be undermined . . ."

A pending case is Todaro v. Ward, (S.D.N.Y.), in which Prisoner Legal Services are seeking an award of $420,000 for successfully representing female inmates who sought an improvement in the quality of their medical case. The state's attorney who is defending the case estimates that plaintiff's attorneys will probably receive an award in excess of $200,000. The irony of the Todaro case is that the New York State Department of Corrections has complained that it lacked adquate funds to hire more doctors and nurses at the facility, but will now have to pay more than $200,000 in attorneys' fees which, if spent on the hiring of medical staff several years ago, would have made this litigation unnecessary.

The legislative history of the Fees Act states that "a prevailing party is entitled to counsel fees even if represented by an organization or if the party is itself an organization." H.R. Rep. No. 1558, 94th Cong., 2d Sess., n. 16 (1976). The courts have held that the rationale for such awards to a legal aid office is to provide compensation for the opportunity costs of its time and efforts. Keyes v. School District No. 1, Denver, Colo., 439 F.Supp. 393 (D. Colo. 1977). The Keyes court felt such offices have limited resources and a possible award would influence the office's allocation of its resources to suits which the Congress wishes to encourage. But what is wrong with state legislature setting priorities for the agencies which it funds? If that concept is too difficult for the courts to comprehend perhaps Congress will be better able to grasp it.

However, to award § 1988 fees to legal services offices, whose very purpose is to prosecute such cases, furthers no apparent legislative purpose. What it does do is to grant a windfall to such offices and a double dip into public funds. Many legal service organizations are initially publicly funded, and to allow them an award of attorneys' fees in essence appropriates a larger portion of the budget to their operation than was originally intended by the legislature, and constitutes a most fundamental abridgment of any concept of a workable federalism. The inevitable result of such award will be the discontinuance of state funding for such organizations, a fundamental (and perhaps unwise) political and legislative decision forced upon the states by the federal courts.

Perhaps the ultimate twist on publicly funded organizations or agencies receiving § 1988 fees from the state which funded it is Seattle School District v. State of Washington, CA 9 No. 79-4643, In that case the Seattle School District, a municipal corporation of the State of Washington, brought a declaratory judgment and injunctive action against the State of Washington to declare invalid and enjoin the applicability of an initiative restricting the school district's ability to engage in mandatory bussing programs. The Seattle School District is a municipal corporation of the State of Washington, created by the State, acting pursuant to state law, and operating entirely with public funds, roughly 90 percent of which are a direct appropriation from the state legislature. After succeeding in the district court, the school district sought an attorneys' fee award under § 1988. The district court refused to grant those fees, reasoning that the litigation had already been paid for twice with state funds, once to support the plaintiff school district and once to support the state defendant, and it would be inappropriate for the court to award more fees from the same source which had already completely funded the efforts of both the principal plaintiff and the defendant. The Ninth Circuit, however, reversed, concluding that the district court "abused its discretion" in denying the school district's application for attorneys' fees.[15] Thus, if that opinion survives further appeal, that litigation will be not once, twice, but thrice funded by the state and the school district will have its legal expenses (approximately $300,000) in challenging the action of its creator replaced because the federal courts made an essentially legislative decision that the Congress intended, in enacting 42

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[15] A petition for reconsideration en banc was rejected by the court on March 26, 1981.

U.S.C. § 1988, to "encourage" the resolution of constitutional issues by requiring the states to fund the efforts of its municipal corporations in challenging state actions. A more fundamental intrusion into a state's purely legislative appropriation process, and thus an abridgment of state sovereignty, can perhaps not be imagined.

The problem with attorneys' fee awards to intervenors and multiple attorneys is also significant and must be addressed. Intervenors are entitled to an award of attorneys' fees to the extent that they are part of the "prevailing" side. Keyes v. School District, 439 F.Supp. 393 (D.C. Colo. 1977). Are they entitled to fees if they were not essential in the first instance, did nothing to advance the litigation or secure the result, and simply "monitored" the trial?

In Hoptowit v. Ray, E.D. Wash., No. 79-359 (1980), CA 9 No. 80-3366, the State of Washington's major prisoners' rights lawsuit, certain named individual prisoners were represented by individual private counsel, even though those prisoners were at the same time members of the class represented by Prison Legal Services and the United States Attorney's Office, who together did virtually 100 percent of the work in the case, and who requested no attorneys' fees at the conclusion of the trial. Other prisoners and/or public interest organizations intervened, and were represented either by private attorneys or organizations. The district court awarded approximately $123,000 in attorneys' fees to these attorneys and organizations, who accomplished or contributed virtually nothing to the advancement of the lawsuit, and who in many cases spent literally days sitting silent watching depositions be taken and "monitoring" the trial.

Perhaps the most eggregious example of multiplicity of attorneys, duplication of "effort" constituting in general an abuse of the entire process, is United States v. Washington, the Indian fishing rights dispute. In Phase I of that litigation, the treaty entitlement phase, originally filed in 1970 and decided by the district court in 1974, attorneys representing parties other than the United States, some of whom are salaried employees of legal service type organizations, have filed attorneys's fee requests approaching three million dollars. Many of these attorneys, as the affidavits themselves disclose, did nothing more than keep an eye on thing on behalf of their own client tribe or organization while the overwhelming bulk of the work was performed by attorneys representing the United States and certain major tribal groups. In

Phase II of that litigation, the environmental degradation phase which has been actively litigated only during the last two years, over fifteen attorneys have filed affidavits in support of fee requests totalling over $480,000, some of whom have never been seen nor heard of by the members of the Attorney General's staff representing the State. To the 480 and some thousand dollars, the attorneys in Phase II are requesting the application of a multiple factor of anywhere from 2.5 to 3.0. The ultimate attorneys' fee award may thus approach $1,500,000, for work which one deputy attorney general who has been involved in that litigation on a daily basis for eleven years was not even aware of, performed by attorneys who never appeared at a hearing, never argued at trial, nor even submitted a brief or participated in any clearly ascertainable manner, and of whom he has never heard.

This last example, of course, highlights what is perhaps the most difficult problem for the attorneys currently practicing in this area to cope with. And that is the question of what is a "reasonable" fee. The extremes are probably illustrated by attorneys' fee requests such as those in New York State Association for Retarded Children v. Carey and United States v. Washington. But is awarding $120,000 for securing some $2,500 in public assistance benefits a "reasonable" fee? Is the application of a factor of 2.5 to an hourly rate already in excess of $100 for "pro bono" attorneys reasonable? See, Marshall v. Coleman, supra. Is awarding over $13,000 in attorneys' fees for the installation of a buzzer over a prisoner's bunk reasonable? In the experience of many of the states and the judgment of the subcommittee, too many courts have simply failed to come up with any reasonable and responsible definition of a "reasonable fee," particularly in view of the fact that public funds, an increasingly scarce commodity, are involved in virtually every § 1983 case. It is thus time to ask Congress to establish workable standards of reasonableness.

Finally, an emerging problem of potentially overwhelming significance is represented by White Mountain Apache Tribe v. Bracker, 48 U.S.L.W. 4897 (1980). In that case the United States Supreme Court held that the State of Arizona was preempted by federal law from applying its motor carrier license tax to the activities of the Pinetop Logging Company carried on exclusively within the exterior boundaries of the Fort Apache Indian Reservation, pursuant to a contract with an organization of the White Mountain Apache Tribe. Pinetop had paid its taxes under protest and then brought suit in the courts of the State of Arizona. An earlier action had been filed in the federal district court, but never prosecuted. The litigation proceeded, initially by summary judgment motions, entirely through the state courts, with no hint of anything approaching § 1983 issues involved. After succeeding in the United States Supreme Court the attorneys representing the White Mountain Apache Tribe have persuaded the U.S. District Court to award them $206,012.07 in attorneys' fees for work performed dating back to 1969, even though no issue was ever litigated in the federal court, no § 1983-type issues were ever raised or litigated in any court, and the work was performed, at least prior to arriving at the United States Supreme Court, entirely in the state court system. The district court reasoned that 42 U.S.C. § 1988 creates a cause of action for attorneys' fees, rather than provides for costs, and allowed for the retroactive application of this "cause of action" to work performed five years prior to the enactment of the statute. If that decision does indeed represent the next trend in this area then attorneys general charged with the responsibility of defending the integrity of their states' treasuries should indeed shutter.

In summary, while the figures themselves are not large, the experience reported by the Tennessee Attorney General's Office can perhaps best illustrate the potential problem facing the states in the § 1983/1988 area. In 1978-79 Tennessee paid civil rights attorneys' fees of $7,020.91. In 1980 this amount rose to $25,140.42. In the first two months of 1981, the State of Tennessee has already experienced civil rights attorneys' fees awards of $30,795.75!

Perhaps Justice Powell's words, found at 4865, 66 and 4868 of 42 U.S.L.W. best sum up the situation facing the states today:

> "Even when a cause of action against federal officials is available, litigants are likely to focus efforts upon state defendants in order to obtain attorneys' fees under the liberal standard of 48 U.S.C. § 1988. There is some evidence that § 1983 claims already are being appended to complaints solely for the purpose of obtaining fees in actions where 'civil rights' of any kind are at best an afterthought. In this case, for example, the respondents added a § 1983 count to their complaint some years after the action was initiated, apparently in response to the enactment of the Civil Rights Attorneys' Fee Awards Act of 1976. (Citation omitted.) The uses of this technique have not been

> explored fully. But the rules of pendent jurisdiction are quite liberal, and plaintiffs who prevail on pendent claims may win awards under § 1988. Maher v. Gagne, ___ U.S. ____ (1980). Consequently, ingenious pleaders may find ways to recover attorneys' fees in almost any suit against a state defendant. Nothing in the legislative history of the Civil Rights Attorneys' Fees Awards Act of 1976 suggests that Congress intended to remove so completely the protection of the 'American Rule' in suits against state defendants." (Footnotes omitted.)
>
> "In my view the court's decision today significantly expands the concept of 'civil rights' and creates a major new intrusion into state sovereignty under our federal system. There is no probative evidence that Congress intended to authorize the pervasive judicial oversight of state officials that will flow from the court's construction of § 1983."

RECOMMENDATIONS

The sub-committee, at its February 5, 1981 meeting in Washington, D.C., and in communications, both oral and written, among its members since that meeting, has discussed three basic courses of action which can be readily described as follows:

1. Do nothing.

2. Reimpose the bar of the Eleventh Amendment for the protection of the states.

3. Amend 42 U.S.C. § § 1983 and 1988 to restrict the scope of substantive liability and to moderate and limit significantly attorneys' fee awards.

It is the consensus of the sub-committee that the third approach should be adopted, and that legislation should be drafted and introduced to accomplish the following:

A. Amend 42 U.S.C. § 1983 essentially in the following respects:

1. Remove the language "and laws" so that the Act would again encompass only constitutionally based civil rights, and not

statutory benefits or entitlements;

2. Incorporate directly into § 1983 a good faith defense so that state or local officers, and municipalities themselves, would no longer be liable in damages for actions taken in good faith, unintentionally or without malice;

3. If feasible, where state or local agency action is involved, to incorporate a requirement for the exhaustion of administrative remedies; and

4. To preclude clearly any award of punitive damages against states or municipalities, or their officers when acting in their official capacities.

B. To amend 42 U.S.C. § 1988 in the following respects:

1. To again reestablish a good faith standard precluding an award of attorneys fees;

2. To prohibit an award of attorneys' fees to the extent that any public agency or organization, either as the plaintiff or as the plaintiff's attorneys, is funded wholly or in part by a state or a local governmental defendant;

3. To establish statutory standards of reasonableness.

a. To the extent that any attorneys' fees are awarded to either private attorneys representing private litigants or public agencies or publicly funded private organizations such as legal services societies they should be based only on the work actually and necessarily performed in order to secure the result obtained.

b. Voluntary intervenors should be ineligible for any award of attorneys' fees unless the intervention was essential in order to protect the constitutional rights of the intervening plaintiffs, and the attorneys for the intervenors made essential contributions to the results obtained.

c. To the extent that we can do so statutorily, duplication of effort by attorneys in multi-party litigation should simply go uncompensated.

d. Finally, amounts awarded as attorneys' fees should be limited by Congress to a reasonable hourly rate for the work performed on behalf of the named parties. No class-action type windfall attorneys' fees should be awarded based on some "benefit to the class" or private attorney general theory.

A suggestion has been made that a cap be placed on attorneys' fee awards by establishing an absolute statutory maximum to be awarded against any public agency, or a statutory maximum hourly rate. The subcommittee has not had an opportunity to fully consider that suggestion, however, and accordingly makes no recommendation thereon at this time.

Attached to this report is a memo from Anthony B. Ching, Solicitor General of the State of Arizona and a member of the subcommittee, reflecting alternative No. 2 above and a letter and attachment from former Deputy Attorney General John M.R. Paterson from the Maine Attorney General's Office reflecting alternative No. 3 above.

TABLE I

State Reporting	No. of Cases Pending or Decided	Total Judgments 1976-1981	Fees Awarded 1976-1981
Arkansas	Does not know	Substantial Program Costs	Not reported
Connecticut	Does not know	Does not know	Does not know
Florida	Does not know	211,042	778,090
Guam	5	12,000	-0-
Hawaii	59	15,386,000[1]	428,000
Idaho	48	Does not know	Does not know
Iowa	14 +	71,000	47,679
Kansas	30	-0-	30,000 +
Louisiana	5 +	Does not know	320,000 +
Massachusetts	35 +	100,000 -	400,000 +
Minnesota	52	Does not know	Does not know
Nevada	75	-0-	105,000
New York	403[2]	Substantial[3]	775,416 +[4]
North Carolina	604[2]	Does not know	Does not know
North Dakota	Does not know	-0-	25,000
Ohio	600 +[2]	85,000	270,000 +
South Carolina	47 +	Does not know	100,000 +
South Dakota	20 +	Does not know	Does not know
Tennessee	200 +[2 & 5]	Does not know[1]	70,965[4]
Vermont	Does not know	Does not know	Does not know
Washington	95 +[2]	Does not know[1]	400,000 +[4]
Wisconsin	Does not know	4,000	49,000
Wyoming	3 +	-0-	-0-
	2,395	$15,669,042	$3,799,150

1/ Includes program costs. Washington and Tennessee alone estimate programmatic costs of pending or decided cases to exceed $50,000,000.

2/ Includes pro se cases in which attorneys' fees are not sought.

3/ New York estimates total judgments, including program costs, in the millions.

4/ New York has currently pending fees' requests exceeding $2,000,000. Washington is facing pending fee requests potentially exceeding $4,500,000. Tennessee estimates litigation costs exceeding $1,000,000 in two cases only.

5/ Tennessee has experienced a 170% increase in its 1983 caseload in 1979 alone.

Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

Robert K. Corbin

MEMORANDUM

TO: NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
SUBCOMMITTEE ON ATTORNEYS' FEES

FROM: ANTHONY B. CHING
Solicitor General
State of Arizona

SUBJECT: ATTORNEYS' FEES

DATE: February 10, 1981

Pursuant to our agreed upon agenda, here is my proposal on amending 42 U.S.C. § 1988 in order to relieve both the burden on our clients and the affront on state sovereignty.

My proposal is to ask Congress to undo what it did in 1976 when it enacted the Civil Rights Attorneys' Fee Act. The Supreme Court in Hutto v. Finney, 437 U.S. 678 (1978), held that Congress in enacting that Act, exercised its power under Section 5 of the Fourteenth Amendment and in effect abrogated states' sovereign immunity under the Eleventh Amendment. I believe that this proposal is simple, straightforward and conveys most fully the message we wish to impart to Congress. It must be noted that I am not asking for the repeal of the Attorneys' Fee Act, my proposal would immunize states and state officials from the attorneys' fee burden. Such an examption is perfectly consistent with principles of federalism which have been a part of our constitutional history since the formation of the Union.

My draft amendment (capitalized) is as follows:

42 U.S.C. § 1988

The jurisdiction in civil and criminal matters conferred on the district courts by the provision of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable

TO: NAAG SUBCOMMITTEE ON ATTORNEYS' FEES

FROM: ANTHONY B. CHING

Page Two

remedies and punish offenses against law, the common law as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. PROVIDED, HOWEVER, THAT NO ATTORNEYS' FEES NOR COSTS MAY BE AWARDED AGAINST A STATE OR A STATE OFFICIAL IN HIS OFFICIAL CAPACITY.

You will note that my draft does not include any provision as to municipalities. It is my belief that to include them would substantially weaken our chance of success by diluting and diffusing our clear argument of state immunity under the Eleventh Amendment since cities and towns do not enjoy Eleventh Amendment protection.

Lastly, I am very much against any attempt to amend 42 U.S.C. § 1983. The full ramification of Maine v. Thibutot, 48 U.S.C.C.W. 4859 (1980) is yet to be determined by the courts and the Supreme Court. Any premature attempt to deal with Thibutot may well weaken the legal arguments advanced by the states. Moreover, if 1988 is amended as I suggested, there is no more financial harm so as to require tinkering with § 1983. My amendment, if successful, would also reinforce the argument that states are not suable as defendants under § 1983.

ABC:bf

JAMES E. TIERNEY
ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

February 18, 1981

Lynne Ross
National Association of Attorneys General
444 North Capitol Street
Washington, D.C.

Re: NAAG Subcommittee on Attorneys Fees

Dear Lynne:

Enclosed for distribution is my proposal to address our concerns with 42 U.S.C. § 1988.

Please note that the proposed bill amends not only 42 U.S.C. § 1988, but any other provision of federal law awarding attorneys fees. It is my understanding that there are numerous such provisions to that effect in the U.S. Code. Rather than amending each such provision, I have attempted through this one comprehensive act to effect an amendment of each such statute.

Some of the bill is borrowed in part from the recently enacted Equal Access to Justice Act, cited in section 2(g). Other parts are created out of whole cloth. In particular, in section 2(f) I elected not to include specific net worth criteria since I thought that to do so would be both unwieldy and difficult to define. Given the rather wide disparity in average income levels among the State (Maine for example is 49th in average per capita income), it is likely that a precisely drawn criteria would have a different impact in Maine than in California. Hence, I chose the more general approach in the draft since it is a decision Courts make daily in indigency matters.

I have not enclosed language for a report to be submitted to the Executive Committee of NAAG. Whatever suggestions I might have for a report are generally covered in the remarks I made to the Association at November's meeting. As I recall, Mal Murphy volunteered to put together a draft report and I would suggest that he borrow from those remarks to the extent he thinks appropriate.

Very truly yours,

John

JOHN M. R. PATERSON
Deputy Attorney General

JMRP:mfe

Enclosure

A BILL

To provide for amendments to the Civil Rights Attorney's Fees Award Act of 1976.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, that this Act may be cited as "The Civil Rights Attorney's Fees Awards Act Amendments of 1981."

FINDINGS AND PURPOSE

Sec. 1. (a) The Congress finds that the award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976 and similar previously enacted Federal laws has resulted in the imposition of excessive attorney's fees and the awarding of fees under circumstances not originally contemplated by Congress.

(b) The Congress further finds that the imposition of such attorney's fees under the Civil Rights Attorney's Fees Awards Act and similar Federal laws against states, counties and municipalities and their officers and employees has imposed unfair costs on such parties who defended claims in good faith, and that such excessive and inappropriate fees awards are hampering government officials in their decision-making process and deterring governmental entities from fairly and fully defending lawsuits brought against them.

(c) It is the purpose of this title to reduce the unfair burden imposed upon States, counties and municipalities and their officers and employees by the imposition of excessive and inappropriate attorney's fees and to limit the circumstances and amounts of fees which may be awarded to prevailing parties under the Civil Rights Attorney's Fees Award Act of 1976 and similar federal laws.

LIMITATIONS ON AWARDS OF FEES AND OTHER EXPENSES

Sec. 2. Subchapter I of Chapter 21 of Title 42, United States Code, is amended by adding the following new section:

Sec. 1988-A. Limitations on Awards of Attorney's Fees and Other Costs.

on behalf of the party, stating the actual time expended, the precise nature of the work done during each increment of time expended, and the rate at which fees and other expenses were computed. Such parties shall also state with specificity the grounds on which the Court should find that the position of the party against whom the fees are sought to be assessed was not substantially justified or was asserted in bad faith.

(e) In awarding attorney's fees and costs under section 1988 of this title or any other provision of the laws of the United States, the fees and expenses shall be computed to provide compensation for the actual cost plus a reasonable profit to the person or entity providing such service to the prevailing party, regardless of the prevailing market rate for these services furnished. No awards based on contingency factors or multipliers may be made by the Court. The Court shall reduce the amount to be awarded or deny an award to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(f) In awarding attorney's fees and costs under section 1988 of this title or under any other provision of the laws of the United States, fees and costs shall be awarded only to a party who the Court determines cannot afford legal representation.

(g) This section shall not apply to Title II of Public Law 96-481.

(a) No attorney's fees or other costs may be awarded to the prevailing party in any action brought pursuant to section 1988 of this title or any other provision of the laws of the United States unless the court finds that the position of the party against whom such fees and costs are to be assessed was not substantially justified or was asserted in bad faith.

(b) No attorney's fees or other costs shall be awarded under section 1988 of this title or any other provision of the laws of the United States unless the court has previously entered a final judgment in the action expressly finding that the party asserting the claim has prevailed as a matter of law and fact on a federal statutory or constitutional claim. Except as the parties may otherwise agree, no attorney's fees or other costs may be awarded where such claims are resolved by the consent of the parties or where the Court finds the claims to be moot.

(c) No attorney's fees or other costs shall be awarded under section 1988 of this title or any other provision of the laws of the United States to any corporation, association or organization the cost of whose legal services was funded in whole or in part by the United States or any state or political subdivision thereof.

(d) A party seeking an award of fees and other expenses under section 1988 of this title or any other provision of the laws of the United States shall, within 30 days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this section. The application shall state the amount of fees and other expenses sought, including an itemized statement from any attorney or expert witness representing or appearing

Subcommittee on Corrections and Institutional
Confinement

Sponsored by Deputy Attorney General Mal Murphy,
Washington

VII.

RESOLUTION

42 U.S.C. SECTIONS 1983 AND 1988

WHEREAS, recent decisions of state and Federal courts have interpreted and applied the 1871 Civil Rights Act, 42 U.S.C. § 1983, and the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, in such a way as to create serious concern among states and municipalities as to the extent of their liability for damages and attorney's fees; and

WHEREAS, the trend of these decisions has been to expand the financial liability of state and local governments and employees for damages and attorneys fees even in circumstances where the state or municipality has acted in good faith or in furtherance of cooperative federal-state programs enacted by Congress; and

WHEREAS, the criteria for awarding attorney's fees under 42 U.S.C. § 1988 have resulted in awards of attorney's fees that are excessive and that are potentially threatening to the ability of states and municipalities to operate within reasonable budgetary restraints; and

WHEREAS, 42 U.S.C. §§ 1983 and 1988, in their present form, have otherwise created inequities in the assessing of damages and attorney's fees against states and municipalities and their officers and employees; and

WHEREAS, it is recognized that 42 U.S.C. §§ 1983 and 1988 implement important social policies that are intended to protect against the violation of federally created rights by states and municipalities and to insure access to the courts by all citizens; and

WHEREAS, a re-evaluation of 42 U.S.C. §§ 1983 and 1988 is warranted in order to balance the important public interests protected by those acts against the legitimate interests of state and local governments.

NOW, THEREFORE, BE IT RESOLVED, by the National Association of Attorneys General that:

1) the Association expresses its serious concern over the matters set forth above; and
2) the Association urges the Congress to take appropriate steps to amend 42 U.S.C. §§ 1983 and 1988 for the purpose of alleviating the serious fiscal liability that now confronts state and local governments' entities;
3) the Association supports the passage of S 584 and S 585;
4) the Association commends the Ad Hoc Subcommittee for its work on this matter;
5) the Association authorizes the General Counsel to transmit this resolution and the subcommittee report to members of Congress and the Administration.

STATEMENT OF DAVID L. WILKINSON, ATTORNEY GENERAL OF THE STATE OF UTAH AND REPRESENTING THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Mr. WILKINSON. Mr. Chairman, it is certainly a pleasure to appear before you as a friend and as chairman of this committee. I am honored that the National Association of Attorneys General would allow me to also represent them in expressing the views of the States. I commend you, Mr. Chairman, for your interests, along with all of your other many responsibilities in this august body, in this particular problem.

I am also honored that Senator Gorton would appear here to introduce not only his attorney general but me and Mr. Wallace. You may not know, Mr. Chairman, that Senator Gorton is sort of a legend among attorneys general, being a former president of our association and being attorney general for 12 years and having personally appeared before the U.S. Supreme Court some 15 times. We, as attorneys general, are very often criticized that the quality of our advocacy before the U.S. Supreme Court is less than it should be, but knowledgeable critics always single out Slade Gorton as the exception to that general rule.

Senator HATCH. He is becoming a good exception in the Senate also. I think he has already set a very good standard for freshman senators.

Mr. WILKINSON. I was asking him just a few minutes ago whether Congress as a body ever sued the executive branch and, if so, who would represent Congress? Would it be the Solicitor General? He said probably not, that Congress would select their own attorney. If you ever have to get to that situation, I think you have a good attorney right in your own body.

I commend to you the report of the Ad Hoc Subcommittee of the National Association of Attorneys General on both sections 1983 and 1988. I commend Mr. Murphy and Mr. Wallace, the principal authors of that document. I think that of all the public testimony by the Attorneys General, that report serves as the Bible.

Rather than follow my prefiled testimony, Mr. Chairman, I am going to take you up on your suggestion and really only address three miscellaneous areas. The first area has to do with what is the actual cost to the States and the municipalities of these two sections as best we can determine? The short answer to that is nobody knows for sure, but it is a heck of a lot of money.

Let me just briefly refer to the report of the ad hoc subcommittee. In the 50 years following the passage of section 1983, that is from 1871 to 1920, only 21 cases were brought under section 1983. All dealt with racial discrimination.

After the case of *Hague* v. *CIO,* a 1939 case which extended the scope of section 1983 beyond racial discrimination, the number of suits grew each year until there were some 300 such cases in 1960. The number of 1983 suits has reached epic proportions during the 20-year period since *Monroe* v. *Pape.* In 1976, out of a total of 57,000 Federal question cases filed in the Federal district courts, almost one-third were civil rights suits claiming constitutional protection against State and local officials.

Now with the ruling in the *Thiboutot* case that section 1983 applies to all Federal laws, the States and municipalities can expect the number of suits against them to increase dramatically. This dramatic increase in section 1983 litigation, coupled with almost certain 1988 attorneys' fees being awarded to successful plaintiffs, will result in the States facing crippling financial liability to an ever broadening interpretation of section 1983.

I would just say that Utah's experience—Utah being a small State populationwise—is that in 1976 there were only about 15 1983 cases brought against the State. In 1980, there were over 100. Already this year, we have had over 75.

Senator HATCH. I might mention that Senator Thurmond, president pro tem of the Senate and chairman of the full Judiciary Committee, has suggested that we keep the record open for the submission of written questions which we hope you will answer as quickly as possible. We will do that without objection.

Senator THURMOND. I may have some questions. I just want to make sure the record is kept open. Thank you very much.

Senator HATCH. Thank you.

Please continue.

Mr. WILKINSON. We have tried to gather the cases for the last 5 years so that we could give you some more specific factual information. In the short time at our disposal, we were only able to gather specific information from some 15 States. Yet looking at the number of cases brought, which is the first statistic we were interested in, we learned that, not even counting the most populous States of California, New York, Illinois, and Texas, there were some 2,000 of these cases brought against the States themselves.

Senator HATCH. That is only 15 States?

Mr. WILKINSON. That is only 15 States and does not include the five most populous States. I think it is safe to say—this is just a wild guess, but it is the best we can do—that there have been over 10,000 cases filed in the country since 1976 against the States based on section 1983.

Senator HATCH. This is just against the States? You are not looking at the municipalities themselves?

Mr. WILKINSON. No; we have no jurisdiction and no access to their information.

On July 8, a representative of the National Association of Counties appeared before this subcommittee and testified that their organization had received responses from 215 cities and counties. There are 39,000 cities and counties so they had received response from less than 1 percent. Yet in terms of money, they determined that presently pending there are claims under section 1983 for over $5 billion. That is with less than 1 percent of all their cities and counties responding. That is money claimed. Obviously, that amount will not be awarded.

At the State level, we tried to ascertain the amount of the judgments entered against the States under section 1983 since 1976. We had a very difficult time since we just have not been keeping records. However, the State of Hawaii has been keeping good records, and in that State alone, over $15 million in monetary judgments have been awarded against that State based on section 1983 actions.

That is the monetary award. The far greater cost is the cost to the State in complying with an injunction issued by a court after

1983 action, the so-called programmatic cost. We have no way of estimating accurately, but I think it is safe to say that the programmatic costs to a State could be as much as five to ten times greater than the actual monetary costs of paying off the monetary judgments.

So far we have just been talking about the judgments. We have not been talking about the attorneys' fees awards. I think it would shock the Nation if they actually realized that the cost to the States of paying the attorneys' fees is greater than the costs of paying the monetary damages awarded by the courts.

Most States that have responded to our questionnaire have shown that they have paid sometimes 10 times as much money to pay off these attorney fee awards than they had to pay to satisfy the monetary judgments entered in favor of the actual plaintiffs.

For example, in the State of Florida the total judgments were only $211,000. The total fees were almost $800,000, four times the amount. I can go on and on: In Massachusetts, $100,000 in judgments and $400,000 in attorneys' fees; Ohio, $85,000 in judgments and $270,000 in attorneys' fees. The State of Nevada had zero in judgments but $105,000 in attorneys' fees.

Senator Hatch. These are fees paid to plaintiffs' counsel and not the cost to the taxpayers in defending these matters.

Mr. Wilkinson. All paid to plaintiffs' counsel. This does not count the cost to the State or municipality in defending a section 1983 action.

Let me refer to another principle which I think may be the most important principle to be considered by this committee. That is the great distortion and harm done to the principle of a working federalism by the way the Federal courts have interpreted section 1983 and 1988. I can find no other phrase to describe the situation than to say it is just completely out of control.

It might be of current interest that before she was nominated to the Supreme Court, Judge O'Connor wrote an article in the William & Mary Law Review in which she advances her belief that the most important danger to the way section 1983 is being applied is the damage to federalism.

Let me just refer to four cases very briefly. There is a case coming out the State of Colorado, *Gurule* v. *Wilson.* In that case, there was a settlement. There was no money involved in the settlement, but both sides signed settlement papers and the Federal district court entered an order based on that stipulation. After that order was entered and the time for appeal had run, the plaintiff's counsel came back and asked the court to reopen the judgment to allow the plaintiff's counsel some attorneys' fees. The district court did that, except it allowed a rather small amount for attorney's fees.

The State of Colorado appealed to the 10th circuit. The attorneys for the plaintiff also appealed, saying they did not get enough. The 10th circuit not only affirmed the district court in saying that, yes, that order should be reopened, but it also instructed the district court to go back and look at the attorneys' fees again because the amount they awarded was too small.

In contrast to what those two Federal courts did, for some reason in that case the same plaintiff brought a parallel suit in the State court, represented by the same attorney and did the same thing. They settled the case without any inclusion of attorneys' fees. It is possible to bring a 1983 lawsuit in a State court. It is done not nearly as often as in Federal court, but it is done not infrequently.

Then the same attorney realized again that he had not included in the order in the State court any attorneys' fees. He sought to reopen. The State did what any good court should do and said, "You stipulated to this. It is too late for you now to come back and seek attorneys' fees." The difference in the same set of facts between the two courts is typical of what our Federal courts are doing.

Second, there is a case out of Hawaii, *Dennis* v. *Chang*. In that case, the Hawaii Legal Services Corporation, funded by the State and representing the plaintiff, came to judgment under 1983. There had been an award of attorneys' fees to the Legal Services Corporation even though it was wholly financed by State funds.

The Hawaii legislature then said, "We will reduce the funding to the Hawaii Legal Services Corporation by the amount of the attorneys' fees awarded in this particular case. We do not want to pay them twice."

The 9th circuit said:

> You cannot do that. You have to fund them what you are going to fund them. Then if they get an attorneys' fee award on top of that, that is theirs.

The obvious result is going to be that the Hawaii legislature next time around is not going to give them any money. I think that is a bad result.

Senator HATCH. The obvious result is we will have contingent fee cases brought by attorneys who are supposedly paid by the public to do services for the poor who will then be looking only for exotic cases that will produce legal fees.

Mr. WILKINSON. Precisely.

Senator HATCH. That is one of the big arguments against the whole National Legal Services Corporation. I might mention that our own ABA fails to look at that. They fail to look at a number of aspects as to the excesses and abuses by the National Legal Services Corporation.

There are a number of us who feel, yes, we should have legal services for the poor, but we should not have an elite corps of storm-trooping attorneys looking for exotic cases which ignore the poor while they are advancing their own social change goals. We are sick of it, or at least I am sick of it. I do not think the Congress is presently of the makeup to change it, but we will just have to wait and see. I know the President is ready to change it. I used to support it, but I will not support it anymore.

Mr. WILKINSON. Senator, this obviously is not a hearing about the Legal Services Corporation——

Senator HATCH. I understand, but I just wanted to bring that out.

Mr. WILKINSON. Since you raised it, I would like to add another word or two.

Senator HATCH. I think this is partially a hearing for that because a lot of these cases have been fomented by those people.

Mr. WILKINSON. I think it is, too. I was just appalled when Mr. William Smith came to visit Sun Valley to speak at the annual convention of the Utah State Bar Association just 3 weeks ago and said that only two-tenths of 1 percent of the efforts of the Legal Services Corporation is devoted to so-called impact litigation.

That is nonsense. He is being intellectually dishonest and he knows it. What he is saying is that two-tenths of 1 percent of all the cases they bring involve impact litigation, but that is the same as saying that if you have two big antitrust cases in your firm, and in the same firm you have 998 collection cases, you are only spending two-tenths of 1 percent of your time on antitrust matters.

Senator HATCH. You may have made a good point there.

Mr. WILKINSON. A former member of the board of the Legal Services Corporation, a professor at a New York State law school, concedes that some 35 percent of the time spent by the Legal Services Corporation and their grantees goes into lobbying or impact litigation.

If we can return to section 1988——

Senator HATCH. That was a vicissitude I was happy to go into. I am happy that you covered some of those points.

Mr. WILKINSON. I am proud to say that the Natio~~nal~~ Association of Attorneys General considered but did not pass a resolution to endorse the continued funding of the National Legal Services Corporation at its present level. I am proud to say that I was one of three attorneys general who led the fight against that.

Senator HATCH. I want to compliment you for that. I did not know that. Not to dwell very long on this subject, but we should certainly help the poor. That can be done without the sustenance and support of, like you say, 35 percent of social change and lobbying at public expense against the very public that is paying for it.

Mr. WILKINSON. What happened to the old-fashioned concept that it is the legislature which changes laws and changes our society?

The State of Washington had an interesting case on this same problem of federalism. In that case, the Seattle School District, which is funded 100 percent by the State of Washington, brought a lawsuit against the State of Washington over a busing situation and apparently prevailed at least in some part.

The U.S. district court refused to make an award of attorneys' fees to the Seattle School District saying, "You people have already been paid by the State. Every dime you get comes from the State."

That went on appeal to the ninth circuit, which held that it was an abuse of discretion for that district court judge not to have awarded attorneys' fees. Now I guess the case is back and the Seattle School District will probably get something like $300,000 in attorneys' fees, meaning that the State of Washington has paid for that lawsuit not twice but three times. It has paid the school district because it funds the school district. It has paid the State to defend the lawsuit. Now it is having to pay the school district for the cost of the attorneys in bringing the lawsuit.

Finally, there is a fourth case which does not involve great sums of money, but I think in terms of federalism it might be the most egregious example of what our Federal judges are doing. I hate to give my true feelings on this case because the Federal judge involved is a good friend of mine and a squash partner, but nevertheless he is dead wrong.

In that case, an attorney's fee award had been made. It was against the State prison. The State prison did then what it had to do under the Fiscal Procedures Act of Utah. It referred that claim to the board of examiners. The board of examiners recommended unanimously that it be paid. The legislature said, "No, we will not pay it. The Federal judge has made the award. Let the Federal judge somehow enforce it."

I do not encourage the legislature in that type of thinking, but this is what the Federal judge then did. He directed the State treasurer to honor a draft which he directed the department of finance to draw. He held a hearing on an order to show-cause of why they should not do this draft and honor this particular check.

We represented them at that show-cause hearing. We said to the judge:

> Judge, the executive branch of government has done all it could to pay this award. We have recommended and the legislature has said no. The only way to meet due process is for you to bring the legislature before this court and listen to them and see if they have any good reasons of why it should not be paid.

The judge said:

> No; I do not want to bring the legislature before me. You people in the executive branch of State government can surely find some way to pay this judgment.

The only way we could pay this judgment is to break State law. I think it is unconscionable that a Federal judge would say he would not even hear a State legislature, or even direct them to come to him. I do not mind the decision so much as I mind the way he went about it.

The final subject I would like to address briefly is what I would term a national scandal. That is the way these attorneys' fees have been sought and awarded.

Our experience in Utah is that before section 1988 was enacted in 1976, the lawyers who would take these causes—as you know, in our State there are not too many of them—would do a reasonably good job of screening out the purely frivolous claims. Now there is a pot at the end of every rainbow. Therefore, they will take almost every case that comes to them and seek attorneys' fees.

Let me refer again to the report of the ad hoc subcommittee. They are talking about a New York case, *New York State Association for Retarded Children, Inc.* v. *Carey*. In that case, the attorneys seek an award for their fees of $2.5 million. A consent decree was entered in the case, but the district court entered an order permitting plaintiffs to receive some attorneys' fees. The motion for fees currently before the court seeks fees for eight attorneys, two law students, numerous nonlegal experts, including their plane fares, hotel, and restaurant bills—and in the case of one expert, his dog kennel expenses covering his trip to New York—secretarial costs, and even the costs of an executive retreat held by the attorneys at a mountain resort where they allegedly discussed the case.

In the State of Washington, there is another egregious example of where the attorneys have just gotten on a gravy train. The case is styled *United States* v. *Washington* and it involves an Indian fishing rights dispute.

In phase 1 of that litigation, originally filed in 1970 and decided by the district court in 1974, attorneys representing parties other than the United States, some of whom are salaried employees of legal service type organizations, have filed attorneys' fees requests approaching $3 million. Many of these attorneys, as the affidavits themselves disclose, did nothing more than keep an eye on things on behalf of their own client tribe or organization while the overwhelming bulk of the work was performed by attorneys representing the United States and certain major tribal groups.

In phase 2 of that litigation, the environmental degradation phase which has been actively litigated only during the last 2 years, over 15 attorneys have filed affidavits in support of fee requests totaling over $480,000. We are talking about a case, Senator, where the attorneys are requesting about $3.5 million in attorneys' fees, but some of the attorneys requesting these fees have never been seen nor heard of by the members of the Washington attorney general's staff who have been representing the State throughout the litigation.

To the $480,000, the attorneys in phase 2 of this case are requesting the application of a multiple factor of anywhere from 2.5 to 3. Their theory is that this is an unpopular case and they in effect may not prevail, in which case they would get nothing. However, to prevail in the sense of 1988, you just have to prevail on one very slim part of what you seek. It can be prevailing on some non-1983 claim for relief.

In the first place, they are seeking $0.5 million, but they want the court to double or triple it to cover hearing the case to begin with.

Senator HATCH. That is interesting.

If I could interrupt you for a second, I have to leave. I am probably on more of these budget reconciliation conferences than any other Senator because of the nature of our committee. We have 180 reauthorization bills that we have to get through by next year, about a quarter to a third of the total cuts, and five and a half of the six block grants. This is probably one of the most crucial meetings I can go to. Therefore, I have to go.

I do not want any of you gentlemen to be offended. It is so wonderful to have an issue that the attorneys general of the United States and I agree on after all the ones we have disagreed on in the past. I just hate to leave.

I have really appreciated the testimony thus far. We are making an excellent record on both sides of this issue. There have been some excellent thoughts raised on the other side as well. We will have Mr. Charles Steven Ralston of the NAACP Legal Defense Fund testify afterwards. Some of you gentlemen may want to stay and listen to that testimony and that of Mr. Heinz Hink, the councilmember and mayor pro tem of Scottsdale, Ariz., on behalf of the National League of Cities.

I will say that this hearing is more in favor of this bill than against it, but we have tried to balance these hearings and will continue to do so as we hold them in the future.

I have appreciated the testimony, but if you do not mind, I had better get over there. However, keep making the record because this is the crucial part of what we are doing. I am going to ask staff to ask the questions which I would have asked so that we can continue to make this record. I hope you will also be open to written questions from any member of this committee or the Judiciary Committee as well.

Thank you.

Mr. WILKINSON. One final thought, Senator: We have diverse politics in our organization, but we are united on this. In fact, one of the more liberal members of our group would like to do away with section 1988 altogether.

Senator HATCH. It has caused a lot of problems. I was interested in the legal services points that you made as well. I think your testimony has to be given great weight because you people deal with this all the time. I think you deal from the people's interests as well. We just have to give every thought to how we resolve these monumental conflicts in law and the disdain that is occurring as a result of it. We are hopeful that these bills will be a beginning point to resolve the conflicts. We appreciate the efforts you have put forth.

Mr. WILKINSON. I apologize to Mr. Wallace for taking too much time here, but I do not get a chance to get my Senator to listen to me for 30 minutes uninterrupted very often.

Let me just finish up on this Washington case. The ultimate attorneys' fee award may thus approach $1.5 million for work which one deputy attorney general who has been involved in that litigation on a daily basis for 11 years was not even aware of performed by attorneys who never appeared at a hearing, never argued at trial, nor even submitted a brief or participated in any clearly ascertainable manner, and of whom he has never heard.

We have a Utah case on a much smaller scale where attorneys were awarded $2,000 for preparing interrogatories which they never served. We have another Utah case where the bulk of the case was handled by Utah attorneys. They consulted with St. Louis counsel, counsel belonging to the National Juvenile Law Center. The case was litigated in Utah. St. Louis counsel is requesting $60,000 in attorneys' fees. They are claiming that $30,000 of that is for time spent on an airplane between St. Louis and Salt Lake City, going back and forth to consult.

Portal to portal, it takes no more than 5 hours to fly between St. Louis and Salt Lake City. Therefore, this attorney has made 30 roundtrips on this one case as a consultant, not as one of the principal attorneys.

Finally, it is obviously the policy behind the enactment in 1976 of section 1988 was to make sure that these unpopular causes are represented by counsel. You would think that it would not be the policy of Congress to provide the very best counsel and the very most expensive counsel available to represent these unpopular causes, right? Wrong.

In the case of *Copeland* v. *Marshall,* the blue chip Washington, D.C., law firm, Wilmer, Cutler and Pickering, was awarded $160,000 for prevailing in a case which the firm had agreed to take on a pro bono basis pursuant to that firm's commitment to the D.C. Bar Association to provide so many hours of its time to pro bono causes.

That case involved a multiplier of 1.5. You can bet your bottom dollar that Wilmer, Cutler, and Pickering, which represents General Motors, would not go to General Motors and say, 'This is our time, this is our billing rate, and, by the way, we are going to charge you 1.5 times our normal billing rate."

This is one of the problems. Lawyers in private practice have to worry about their fees. They would like to represent this particular client again, but the lawyers who represent the section 1983 plaintiffs, when they look to the Government for payment, really do not care if they please their client.

Compare this with the lawyers on the other side, the assistant attorneys general or the city attorneys or county counsel or whatever. In our office, and our office is probably on the low side of the spectrum, the very top paid lawyer in our office costs the State no more than $35 an hour for his time. That includes his overhead. Of course the cities and counties are worse off in virtually every case in the quality of their representation in what they can afford by way of counsel.

Let me conclude by quoting my good friend General Eikenberry as we were discussing this. He said, and I am sure it was not completely in jest—in fact, perhaps more seriousness than levity—that if this were happening in 1776, we, as public lawyers, would resort to arms to cure this problem.

Thank you very much.

Mr. ORMSBY. Thank you, Mr. Wilkinson.

[The prepared statement of Mr. Wilkinson follows:]

PREPARED STATEMENT OF DAVID L. WILKINSON

I have been asked to testify about two bills presently under consideration by the Subcommittee, S. 584 and S. 585. Both bills seek to amend Section 1979 of the Revised Statutes (formerly Title 42 U.S.C. Section 1983). It is my understanding that the Subcommittee would be interested in problems experienced by the states in defending lawsuits brought under Section 1983, including some concerns not specifically addressed by the legislation presently before you.

I, therefore, will discuss significant problems encountered by the State of Utah and its political subdivisions in defending civil rights lawsuits brought pursuant to Section 1983, in addition to commenting about S. 584 and S. 585. Any discussion about Section 1983 must include reference to Section 1988, the Attorney's Fees Award Act of 1976. The inseparability of Section 1983 and Section 1988 is critical to the Utah experience with the Civil Rights Act, so my testimony will focus on both statutes.

I am sure that this Subcommittee is familiar with the historical development of lawsuits brought under Section 1983. My few minutes today are inadequate to do that development justice. A brief background may be helpful, however. Section 1983 was enacted after the Civil War to afford specific legal relief for racial discrimination against former slaves. The bill was directed at unlawful, discriminatory actions committed under authority of state law and was designed to enforce the Fourteenth Amendment to the Constitution. The application of Section 1983 was limited to cases of racial discrimination for decades. But gradually, beginning in the 1930's, the scope of state actions subject to legal attack under Section 1983 was enlarged. In Monroe v. Pape, 365 U.S. 167 (1961), decided by the United States Supreme Court in 1961, an unreasonable search by police was found to violate Section 1983. In the last two decades, federal courts throughout the country have expanded the application of Section 1983 to include violations of the Fourth, Fifth, and Eighth Amendments and in 1980, in Maine v. Thiboutot, 100 S.Ct. 2502 (1980), the United States Supreme Court included violations of all federal statutes within the scope of matters for which Section 1983 provides a remedy.

Likewise, the parties who can be sued in civil rights actions have expanded. In Monell v. Department of Social Services, 436 U.S. 658 (1978), a 1978 decision, the United States Supreme Court ruled that municipalities were "persons" within the meaning of Section 1983. The Court also disturbingly held in that case that municipalities were not protected by the Eleventh Amendment. Other recent cases by the Supreme Court seem to increase the kinds of conduct by public officials which may subject them to liability under Section 1983. In Parratt v. Taylor, United States Supreme Court, (No. 79-1734, decided May 18, 1981), decided in May of this year, the high Court again intimated that mere negligence on the part of state officials may be actionable under Section 1983, and in Owen v. City of Independence, Missouri, 100 S.Ct. 1398 (1980), a 1980 decision, the Court held that the qualified good faith immunity, a traditional defense in these cases, was not available to a municipality in a Section 1983 action.

Necessarily, judicial interpretation of statutes results in changes in the scope and application of statutes; such developments are not unique to lawsuits based on Section 1983. Indeed, our common law contemplates changes in the law, even changes which were unforeseen by the original drafters of state and federal statutes. I am not here to urge radical changes in Section 1983. The states and their political subdivisions universally recognize that they should be accountable for actual misconduct of their officers and employees which significantly impairs the constitutional rights of their citizens. I am not urging that we avoid our responsibility or liability. I believe, however, that the modifications to Section 1983 contained in S. 584 and S 585 are reasonable, necessary, and consistent with the purposes for which the statute was intended.

In order to explain my position that S. 584 and S. 585 are needed, I must discuss the practical effect of Section 1983 on the states. Such a discussion necessarily includes comment on the impact of Section 1988, the Attorney's Fees Award Act of 1976, to explain why I urge this Subcommittee to closely study and modify Section 1988 along with the proposed amendments to Section 1983.

Section 1988 states in essence that a prevailing party in a Section 1983 case (and cases under other civil rights statutes) may recover reasonable attorney's fees from the losing party. The purpose of the Act was to encourage meritorious lawsuits seeking redress for conduct under state authority which may have violated the constitutional rights of individuals. Congress apparently believed that the availability of attorney's fees was necessary to entice lawyers to initiate and pursue civil rights cases. The purpose of the act was laudable. However, through judicial interpretation and application, Section 1988 has become fiscally onerous.

Of even more concern to the states than mere financial impact, however, has been the disastrous synergy of an expanded Section 1983 with Section 1988. The combination of these statutes or, more accurately, the judicial interpretation and application of these two statutes, has produced unjust and unwarranted results. I will mention some examples in my remarks and additional examples are appended in my written submission to the Subcommittee.

While there have been some slight differences in judicial interpretations of Section 1988, most courts have construed it very liberally in favor of plaintiffs' attorneys. Although the statute states that the prevailing party may be awarded fees, only plaintiffs' attorneys have really benefitted. Most plaintiffs are indigent and effectively incapable of paying fees. Recent decisions of the Surpeme Court hold that defendants may seek fees when they prevail only if the action was totally without merit, frivolous, or brought in bad faith, Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978). Thus, only plaintiffs' lawyers seek and obtain fees under Section 1988.

Another problem in Section 1988 cases is determining who is the prevailing party for purposes of attorneys' fees. This question, and the question of what is a reasonable fee, have received some astonishing answers.

A party may prevail in a Section 1983 action either by gaining injunctive relief or monetary damages, or both. Both kinds of relief may also be obtained for pendent state claims alleged as part of a Section 1983 action even if the underlying Section 1983 claim is unsuccessful. Because of the federal court's expanded view of Section 1983 and liberal rules allowing pendent claims, the number of Section 1983 cases filed has increased dramatically. In Utah, for instance, the number of cases has increased from approximately

15 in 1976 to 100 in 1980 and over 75 already in 1981. Every state in the union has had a similar experience.

In a growing number of these cases, the plaintiffs were the prevailing party. This is a result of the expanded interpretation of Section 1983 and the liberal application of Section 1988.

Let me give an example which is representative of cases in Utah.

In 1974 the Supreme Court said that prison disciplinary procedures must afford inmates certain elements of procedural due process before "good time" can be withdrawn. (Wolff v. McDonnell, 418 U.S. 539 (1974).) These elements include notice of what constitutes improper conduct, written notice of an alleged violation, a hearing with a limited right to call witnesses, a written statement of the evidence relied on and reasons for the decision.

Utah enacted its own procedures for prison disciplinary problems based on the Supreme Court case. Since 1974, Utah federal courts have found that the state's own regulations impose procedural requirements on prison officials not mentioned in the 1974 decision. The courts have further found that failure to satisfy these requirements may result in a prisoner's loss of a liberty interest without due process; and such a loss is actionable under Section 1983. If one of the requirements is not met, (for example, adequate written findings of the reasons for a decision or an adequate statement of the evidence relied on) the inmate has suffered loss of a liberty interest without due process.

Under the "new" Section 1983 the inmate would not have to experience any additional "injury" to state a claim under Section 1983. Cases have held that the constitutional violation itself is injury. Assume the inmate lost his visiting privileges for two weeks as punishment. Such state action in Utah is a violation of Section 1983.

In most cases no money damages are awarded and the court orders the record of the disciplinary procedure removed from the inmate's file. Preparation, research and filing of such a case may take five to seven hours. One discovery request may take from two to four hours. An average rate is $60.00 per hour. For this case a prevailing plaintiff's lawyer would receive approximately $600.00. There are over 1,000 inmates in the Utah State Prison. Several hundred disciplinary hearings are held each year. The staff turnover rate is around 30% because of low salaries and low morale, caused in great part by the difficulties of administering "perfect" disciplinary hearings.

It does not require an economist to see the potential for financial liability facing the states and the absurdity of the result caused by federal lawsuits for minor administrative errors. Money is diverted to pay attorneys' fees so the prison has insufficient funds to make necessary improvements; low wages and the possibility of being sued cause low morale and high turnover which causes more errors in disciplinary hearings which results in more attorneys' fees. This example is by no means an exaggeration. The increasing realization by prisoners of the effectiveness of this procedure will result in even more cases being filed. Similar procedural requirements with concomitant potential for error are common to most state agencies. Because of the expanded application of Section 1983, the federal courts are becoming the forum for all grievances between citizens and the states.

There are many other problems caused by the interaction of the "new" Section 1983 and Section 1988. The remainder of my testimony will consist of a catalogue of sorts recounting some specific difficulties we have encountered in Utah and some further general observations.

A. Very often the attorneys' fees award is disproportionately larger than the relief obtained. For example, in Oniskor, Logan and Dock v. Milliken, No. C-79-0142, U.S.D.C, Utah 1980, a Utah case resolved by consent decree, three mentally ill prison inmates claimed that they were involuntarily receiving psychotropic medication from prison doctors. They asked for money damages and a change in prison procedure. The case wa settled and new regulations were drafted by following the state's involuntary commitment statute. Each inmate received $500.00. Their three lawyers, after having their fees reduced, received approximately $22,000.00. That included almost $1,000.00 to enforce payment of the fees. Most of the work involved drafting the complaint and educational reading about psychotropic medication.

No appeal was taken because the requested amount was reduced almost $8,000.00 by the court in making the award. Before further reducing a fee award, all federal appellate courts require a showing of abuse of discretion by the trial court awarding fees. A significant reduction in the amount awarded makes such a showing virtually impossible. Moreover, many federal courts award additional fees for time spent on appeal of fee awards.

B. An example of disproportionate awards and the risk of additional fees cause by appeal is a case brought by an inmate in the Salt Lake County jail against county officials. Langley v. Vance, U.S.D.C. 1981 Utah, No. 79-0015. The plaintiff was awarded $10,000.00 in damages. His two lawyers were awarded $28,000.00 for the trial. After an unsuccessful appeal by the defendants an additional $17,000.00 was awarded for the appeal. This included compensation for forty-five hours of editing and proofreading at approximately $75.00 per hour.

C. In another Utah case brought under Section 1981, a prevailing plaintiff was awarded $1.00 in nominal damages from a private defendant (a Utah bank) in a race discrimination case. His attorney received over $4,000.00 in fees.

D. The application of Section 1988 is even more onerous because a prevailing party can be compensated for work done on all issues in a Section 1983 lawsuit, even if some issues are unproductive, rejected or rendered moot. That view is found in Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979), decided by the Sixth Circuit in 1979.

Utah has had a similar experience. Balderas v. Matheson, No. C-75-220, U.S.D.C., Utah 1979. In a prison case, in which the United States Justice Department appeared as an amicus on behalf of inmates and did almost all of the work on the case, the local Legal Services Office was awarded over $21,000.00 for sending a lawyer to attend depositions and hearings and monitor pleadings. The court awarded $2,000.00 for preparation of interrogatories which were never served on the defendants or filed with the court.

This problem is compounded when, as in this case, the prevailing plaintiffs' counsel work for a publicly funded legal services organization. An award to such organizations results in double compensation, paid by the taxpayers, and reduces the incentive to compromise on fees because salaries and expenses are already being paid.

E. The ultimate fiscal impact of Section 1988 is difficult to estimate because federal courts have experienced considerable difficulty in deciding what are reasonable fees. Some courts have awarded an hourly rate, others a percentage of the damages awarded the plaintiff, other courts have fixed a "reasonable" amount. Of course what is reasonable compensation on an hourly fee basis to a team of attorneys, all performing duplicative or non-legal services is quite different from a single assistant attorney general who makes the equivalent of $15.00 per hour for almost identical work representing defendants.

A few courts have used a multiplier to enhance awards by a factor of 2 or 2.5 to compensate plaintiffs' counsel for the contingent nature of Section 1983 actions and the undesirability of many Section 1983 cases. Clearly these multipliers create windfalls and act as punitive damages against a state, which may enjoy a qualified immunity from money damages under the common law, and certainly under the Eleventh Amendment.

F. One very disturbing aspect of Section 1988 is the frequent use of the federal courts by citizens who have no disincentives to bringing lawsuits against governmental entities. These plaintiffs include prison inmates, jail inmates, incarcerated juveniles, and individuals committed to mental health facilities. These citizens should have access to the courts and do - often with free legal assistance provided through contracts with the states. The availability of Section 1983 for technical violations of state procedures which implicate constitutional rights encourages lawsuits in federal court. The courts are already burdened with these cases and the avalanche is still to come. When the onslaught of civil rights cases is combined with liberal attorneys fees awards, the federal courts and state fiscal and human resources will be severely strained.

G. In a case involving the state's only secure juvenile offender facility, still in litigation after six years, plaintiffs' counsel have requested over $125,000.00 in fees. They have also indicated they will ask the court to adjust the award upward to reflect an increase since 1975 in the consumer price index. This case illustrates many of the abuses possible under the current judicial treatment of Section 1988:

One abuse is the routine use of several attorneys, where one or two would be sufficient. In the case above, five plaintiffs' lawyers have worked on the case. In many instances three or four lawyers are demanding fees of $50.00 to $125.00 per hour for the same work - often "consultation and strategy meetings" or "trial preparation and strategy." Defendants have no way to limit the number of plaintiffs' counsel and some courts have been willing to award fees for undefined "consultation", involving several lawyers.

Another problem associated with the involvement of several attorneys is the admitted use of large class action suits as a "training ground" for young lawyers. Thus, while one plaintiffs' counsel conducts a deposition, an inexperienced plaintiffs' lawyer will observe. When fees are requested, both lawyers request fees, although the plaintiffs gained no benefit because of the presence of the additional lawyer.

The fiscal implications of a fee request as large as the one I've mentioned are grave. This case sought only injunctive relief, which if granted, would necessitate the construction of new secure facilities. If even 50% of the fees requested are awarded, the state agency, which is committed by court order and state policy to construct such new facilities, will be forced to fire employees and suspend or eliminate other programs to pay the fees. The payment of fees frustrates the very relief which generated the fee request. Such a result seems inconsistent with the congressional and judicial intent of Section 1988 which was to encourage redress of civil rights violations.

This case raises again the problem of publically funded organizations receiving the fees awarded to lawyers employed by these organizations. In this case, approximately $118,000.00 has been requested by attorneys from publically funded legal organizations. Over $70,000.00 of that amount comes from a group (The National Juvenile Law Institute, St. Louis, Missouri) which is funded by the federal government specifically to litigate cases involving juveniles. This flow of money from the state, both indirectly (in taxes) and directly (in payment of fees) makes it increasingly difficult for the states to solve local problems and meet state needs.

H. Two kinds of problems with the Civil Rights Act are illustrated in the case of Klaips, et al. v. Bergland, et al., U.S.D.C. Utah, No. C-79-0224. Here the plaintiffs challenged both state and federal regulations which resulted in a denial of Food Stamp benefits to a class of persons and succeeded in defeating the state regulation but not the federal regulation. Plaintiffs prevailed on a statutory theory under the Food Stamp Act and not under any constitutional theory or act designed to enforce civil rights, and thus would not be allowed attorney's fees except for the reasoning in the Thiboutot case. Additionally, even though the federal government was a defendant and actively participated in resisting the action, the plaintiffs' attorneys (a federally-funded legal services office) sought to collect fees for the entirety of their time devoted to the case from the state defendants. Even after reducing the award by approximately one-half, because among other reasons, the United State was a defendant, the judge still awarded more than $8,000.00 in fees. Such award is unwarranted by a case which was decided on cross-motions for summary judgment rather than at trial, and the fees awarded ultimately do nothing more than reduce the amount of state money that is available to administer entitlement programs such as Food Stamps. Passage of S. 584 would eliminate an attorneys' fee award in a case of this kind.

I. In Allen, et al. v. Harris, et al., U.S.D.C., Utah, No. C-78-0212, the court invalidated both state and federal regulations permitting the deeming of spousal income for the determination of Medicaid eligibility and benefit levels, and awarded substantial attorneys' fees but only against the state defendants. To avoid further exposure to attorney fee liability and because the case law from the circuits at that time unanimously supported plaintiffs' position, the state did not appeal, but the federal defendants did appeal. (The federal government is not liable for attorney's fees.) In the meantime, two circuits handed down decisions upholding deeming of income and the issue reached the United States Supreme Court in the Gray Panthers case. The High Court upheld the validity of the practice of deeming of income. The Tenth Circuit will now be obligated to reverse or vacate the order in the Allen case, but since the state did not appeal and the plaintiffs prevailed in the lower court, they are still insisting on collecting their attorney fee award, even though the practice they sought to eliminate has actually been upheld by the United States Supreme Court. On the other hand, had the state appealed, and the practice of deeming had ultimately been disapproved by the Supreme Court, plaintiffs would clearly have sought to recover all of their attorneys fees against the state defendants. The case shows the manner in which the present statutes place states constantly in a no-win posture, regardless of which approach they take.

J. Another problem is illustrated in Colyar v. Third District Court, U.S.D.C. Utah, No. C-77-0314, main decision reported at 469 F.Supp 424. The case is nothing more than a request for declaratory judgment that particular portions of Utah's mental health civil commitment statute are unconstitutional. Again the plaintiffs were represented by attorneys from a federally funded legal services office who were seeking to accomplish through the judiciary something which should have been determined by the Legislature. Nevertheless, the court ruled one particular part of the statutory scheme invalid as a matter of first impression and then awarded attorneys' fees of a little over $11,000.00, reduced from a request of about $15,000.00. (The request had even included time spent lobbying the Legislature with respect to mental health laws. The Legislature amended the statute in accordance with the declaratory judmgent within a matter of days.) Although the Third District Court was the named defendant, it of course had had no part in the creation of the statutory scheme which was found to be invalid and had no funds out of which to pay an award of attorneys' fees. The Legislature, which was ultimately responsible for the statute, also declined to appropriate money to pay the award, leaving state officials who handle state funds at risk of being held in contempt of court if they did not violate state law and pay state funds for a purpose for which they were never appropriated.

The result in this case, with respect to attorneys' fees, could be altered by amending Section 1988 in one of the following ways: (1) to reverse Hutto v. Finney, 437 U.S. 693 (1979), and preserve the state's traditional Eleventh Amendment immunity; (2) to prohibit publicly funded legal servcies offices from collecting fee awards, i.e., eliminating double dipping; or (3) excluding declaratory judgments on the validity of statutes from the ambit of attorneys' fee awards.

K. Because of the Supreme Court decision in Christianburg Garment Company v. EEOC, 98 S.Ct. 694 (1978), defendants who prevail in civil rights actions many only recover attorneys' fees if the action is found to have been frivolous, unreasonable, or in bad faith. Certainly prevailing plaintiffs who seek attorneys' fees have no similar burden. They may receive substantial attorneys' fees regardless of the insubstantial subject matter of their lawsuits or the minor nature of the relief obtained.

An example of the injustice to prevailing defendants is the case of Caldwell v. Wheeler, et al., U.S. District Court, Utah, No. C-80-0062W. The plaintiff in this case was not impecunious, and was represented by private counsel as well as a legal services office. After over a year of extensive discovery, motions, and court appearances, motions to dismiss were granted in favor of many of the defendants.

These prevailing defendants requested and were denied attorneys' fees because the court found that plaintiff's action was not "frivolous, unreasonable, or without foundation."

At least one of the prevailing defendants, who was denied attorneys' fees, was a young woman with a family and little financial security. She was required to engage private counsel for over a year, eventually succeeded on a motion to dismiss, but had to bear the full costs of her defense because the suit was not "frivolous."

CONCLUSION

S. 584 and S. 585 would alleviate the pressure of cases brought in federal court under Section 1983 which could be more quickly, economically and efficiently litigated elsewhere. The modifications contained in S. 584 and S. 585 will help restore Section 1983 to redressing actual constitutional violations which occur under state authority. They are, however, minimal changes rather than a radical departure from the development of Section 1983 remedies.

Nevertheless, any change in Section 1983 will have little ameliorative effect unless Section 1988 is modified to limit attorneys' fees awards to cases where a plaintiff clearly prevails on substantive constitutional issues and makes a well-documented showing of an entitlement to fees proportionate to the relief obtained.

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Mr. ORMSBY. We will now hear from Mr. Wallace.

STATEMENT OF JAMES WALLACE, JR., DEPUTY ATTORNEY GENERAL FOR THE STATE OF NORTH CAROLINA AND REPRESENTING THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Mr. WALLACE. Thank you, Mr. Ormsby. I assume you are the new chairman. I need a chairman to address. If you do not mind, I will address you.

I would like to thank the committee for its time today, too, and for giving us the time to come here. It has taken us quite awhile to get here. We have been treated with great deference by the committee and by the staff members and I appreciate that fact.

The attorney general sends his regrets that he was unable to be here. He was committed for today before this date was set and simply could not get out of the appointment.

He has asked that I read a speech that he will give tomorrow to the North Carolina Association of Municipal Attorneys in Wilmington, N.C. I know that to date the committee has dwelt more on municipal problems than on State problems, but, in one sense, they are all the same problems. I think the speech continues to be relevant.

He has asked that I read the speech into the record, but I am aware of time considerations, too. It is a 10- or 15-minute speech and I do not think that would serve any real purpose considering the time limitation. If everybody in the room will promise that should they come upon the attorney general in the future they will tell him I did an excellent job of reading the speech, I will get on to the task of summarizing it in about 2 minutes and he will never know the difference.

Mr. ORMSBY. Thank you. That would be fine.

Mr. WALLACE. Let me say first that he had a reason for wanting the speech at least brought to your attention and certainly for having it put in the record. There were two primary reasons: To bring home the fact that these hearings are not being held in a vacuum and that no decisions are being made here in a vacuum. We are talking about a real problem that faces real people who are having dialogues about it on the grassroots level. Sometimes we separate ourselves from that situation and do not realize it as strongly as we should.

It is also somewhat of a shame that in such an esoteric area this problem has become the type thing that political speeches are made of. This speech to be given tomorrow is a political speech. It is to colleague attorneys, but it is a political speech as much as it is a delivery on a problem confronting us. It is serious, I think, that an area of law this complicated could become the stuff of political speeches. To me and the attorney general, that is the best indication of all that something simply has to be done about the problem.

To begin summarizing the speech, first of all Attorney General Edmisten acknowledges the fact that our office has been deluged by calls from municipal attorneys of towns that have been sued by various organizations, including the U.S. Justice Department but also many legal services organizations and civil rights organizations.

At the outset of the speech, he promises to do something about the situation. He makes the statement that he would be derelict in his duty if he did not do something about the situation.

He of course brings up sections 1983 and 1988: He says that he hopes that not too many people in the room have been touched yet by the 1983 litigation even though he knows that they are all familiar with it.

In North Carolina, we sometimes tend to think that in some areas we can sit and watch the world go by, that cities like New York and Los Angeles have all the problems, that massive civil rights cases do not hit North Carolina, and that small North Carolina towns do not get hit with massive civil rights cases. That is not the case anymore.

He mentions the towns of Goldsboro, N.C.; Rocky Mount, N.C.; Roanoke Rapids, N.C.; and New Bern, N.C. Those have just been joined by a small town, Enfield, N.C., where the services of the attorneys for the cities are dedicated almost exclusively to defending these small towns against civil rights actions. I mean massive civil rights actions that have gone on for well over a year now and may go on for several more years.

Again, as General Wilkinson says, there is not much possibility that the plaintiffs will not prevail on some aspect of the suit. The cities are burdened with paying these attorneys large attorneys' fees, their own attorneys in defending these actions, and then on top of the defending of the suit, if there is any prevailing at all, they will be hit with attorneys' fees in addition to programmatic costs and what have you.

I stress again that this is even in a case where the suit is without merit, and even in a case where the suit is found to be without merit. Those are precious few in these days and times. The cost is still overwhelming to some of these municipalities.

At one point we had considered whether one of the women who represents the town of Wilson, N.C. would come before this committee and testify. I was informed at some point subsequent to the conversation I had with her about that that the town of Wilson, N.C. did not feel that in good conscience it could spend the money to buy her a plane ticket to come up here. It was in that kind of financial straits, largely because of the litigation it had faced for the past year and the expenses it had paid out because of that litigation. I submit that is getting just about to the point of ridiculous.

The attorney general expresses his concern about the decision in *Thiboutot.* He expresses his worry about the fact that there no longer need be a finding by the Federal courts that the State official has violated any constitutional rights before the fees can be awarded. He also expresses his serious concern about the fact that "prevailing party" has been defined by the courts in a very liberal way.

Some statistics in the speech have been covered already. Obviously it would not serve any purpose to cover those.

Let me read just a few selected portions. Then I will be finished. I do not want to take too much time.

On page 5 of his speech, he says this: "I have touched on the burdens placed upon you by 1983 litigation itself. I don't maintain that I support the developments in this area of the law, but somehow I had almost become conditioned to expect them. I cannot, however, in good conscience accept without objection the latest developments in *Thiboutot.* I cannot accept the Federal Government's requiring your client cities or the State to attempt operation within reasonable budgetary restraints while including in their budgets a line item to cover, each year, a liability for attorney's fees that will remain unpredictable and unbearable. I cannot accept judicial mandates or congressional directives that encourage plaintiffs' attorneys to move for fees that reimburse expert witnesses for their dog kennel expenses or attorneys for weekends spent at mountain resorts for the purpose of 'planning strategy.'"

I think we have all heard that about 100 times and all love to talk about it. It is in this speech, too.

The attorney general states that he thinks possibly we have gotten to the point in society today where good government simply cannot continue to function unless some changes are made. He promises the municipal attorneys that he will not remain inactive on the issue.

He says that he specifically supports amendments to sections 1983 and 1988, that he is seriously committed to a drastic amendment to the current 1988 so that fees will not be paid out at the rate they are being paid out now and essentially will not be paid out under any circumstances similar to those that we operate under today.

He says this, which I think is important: "We are working with the Congress because I am convinced that the solution can only come from Congress. I don't necessarily mean to say that I disagree with what Congress did when it enacted section 1988. Rather, what I am desperately trying to do through my office is to educate the Congress on just how awry the application of this statute has gone. It has been used to subject governmental entities to unreasonable obligations, and it simply must be amended. What we are talking about plainly and simply is some good old-fashioned, realistic fiscal responsibility, so that you people can get on with the job of good government."

There is one other passage I want to read, Mr. Chairman, because it is highly relevant, and it is very important to the attorney general that it be read. It is one paragraph that says:

> Now I want to and I need to take a minute here to digress a bit. If you have gotten the impression that I am here to oppose civil rights, you are wrong. I am not. And I don't oppose an improvement in the quality of life for all of our people. But I can get pretty angry when I see millions of dollars a year paid out of city, county, and State treasuries for attorneys 'fees in civil rights actions instead of going toward improvements in the quality of life that lawsuits of a civil rights nature were originally intended to bring about. I want the record clear on that. I hope you consider me a practical attorney general of the State of North Carolina, and I just like to think that I have a little bit of commonsense and a basic sense of fairness. I like to think that I have some small influence in the way that things get done.

The attorney general goes on in the closing paragraph of the speech. I think this is very important, too. It is where we have to be to accomplish anything. He says that he realizes a bipartisan effort is needed to get something done in the area and he is ready to operate on a bipartisan basis. He says he is willing to work with anybody because of the problem. He is ready to do anything he can to eliminate the problem.

I would just like to reiterate that I, too, think it is going to take a bipartisan effort. This is not a Republican or Democratic cause. It is not a conservative cause. In my opinion, the bills are fiscal responsibility bills. I think that the members of both parties that have been touched by the problem confronting us would gladly embrace some kind of solution to that problem. I sincerely hope that is what will happen.

I want to read one short memorandum I received from a staff attorney just a few days ago as I was getting the package ready to submit to the committee. It is to me from Steve Shaber of our staff. It says:

> We previously advised you of a pending attorneys' fees motion in the case of *Willie M.* v. *Governor Hunt, et al.*, wherein the plaintiff's lawyers were asking for $179,000 as an interim fee for 2,567 hours work. The U.S. district court cut those hours approximately 11 percent and awarded plaintiff $167,000. The court paid a flat $70 per hour for all work by all attorneys despite our showing that $50 per hour was the prevailing rate. The court made no distinction between travel time and court time. Two of the plaintiff's lawyers who were in their second year of practice

received the same fee as their senior colleagues, which particularly disturbs us since these young lawyers accounted for approximately 950 of the billed hours. Finally, four legal aid attorneys were compensated at high market rates.

We recognize that the case law provides for this, but we argued that our case was distinguishable because the legal aid attorneys played a supporting role to the private lawyers in the case. We have appealed the case. Plaintiffs have cross-appealed, saying the court wrongly failed to pay them a bonus.

This has got to stop. It is as plain and simple as that. We cannot do it, but we can certainly urge you to do it. I would just like to think that we are not far from the point where we will see some reasonable solution to what has confronted the States, the counties, and the municipalities, especially since *Thiboutot* came down. There simply has to be some remedial action on the part of the Congress.

To add parenthetically, I have not said anything about S. 990, which I intended to comment on, but because of time restrictions, I do not think I will comment on for long. I have reviewed the written material that the State of Washington has submitted to you. I can assure you that North Carolina wholeheartedly concurs in Washington State's feelings about S. 990.

My very short statement about 990 is this: In light of the deliveries given to the subcommittee today, it must be quite evident how everyone at this table feels about S. 990. For that reason, there need be no great elaboration to the fact that we object to S. 990 and urge you to look unfavorably upon it.

I glean something when I read 990. I glean that there are those who would support legislation to relegate State court judges to a second-rate situation when it comes to enforcing or upholding any constitutional provisions or when it comes to studying any civil rights matter. I do not think that the judges in North Carolina's State courts are second-rate at all. I do not think they are any less able to read or uphold the Constitution of the United States than any Federal judge I have ever met.

I think the Congress should recognize the ability of the State courts to handle some of the litigation that goes before the Federal courts under 1983. That is the primary reason that the attorney general of North Carolina opposes S. 990.

That concludes my statement. Of course, I, along with the rest of the members of the panel, am more than happy to answer questions.

[The prepared statement of Attorney General Rufus Edmisten submitted by Mr. Wallace follows:]

Comments by Attorney General Rufus Edmisten

I'd like to get serious for a moment and talk about a dead serious problem—attorney's fees. I know that's a term that normally rings music to your ears; but today I want to talk about a different kind of attorney's fees—the kind you can't get—the kind that your clients have to pay. I'm talking about fees that may be awarded against your client cities in so-called civil rights actions. Now, this may be a problem that you think my staff and I know nothing about—or one that you think I can't or won't do anything about. Not true. In light of your frequent contacts with our office over the attorney's fees trend and over matters concerning your section 1983 litigation in general, I could not possibly help but be aware of your concerns, and as for my doing my part to help remedy the situation, I would be derelict in my duty as your attorney general if I did not do so.

The dilemma that faces you—and me—is twofold. It arises from developing trends in court interpretations of 42 U.S.C. section 1983 (the age old civil rights statute), combined with the amendment of 42 U.S.C. section 1988, by the 1976 Civil Rights

Attorney's Fees Awards Act. Court interpretations of section 1988 haven't helped a bit either.

Let me stress at the outset that this won't be a technical delivery today, because time simply will not permit that. I won't get any more technical than necessary to get to the meat of the situation and discuss what to do about the challenge facing us at both the city and State levels.

I know that everyone in this room is familiar with developments in section 1983 litigation, and I know that many of you have been touched by those developments. Defending your cities against section 1983 actions in this day and time, even when claims are eventually found to be without merit, can cost a minimum of thousands of dollars and can occupy an entire law firm's time for months, even years.

To get your information on how bad the situation can get, you don't need to check with the Corporation Counsel of New York City or Los Angeles—call the officials of Goldsboro, Rocky Mount, Roanoke Rapids, or New Bern, or their lawyers. Ask them about the litigation they have been subjected to over the past year or so. Rebecca Giles, an attorney for the town of Wilson, N.C., can tell you what the future might hold for you and your clients if you haven't faced this type of litigation yet. She and the other members of her law firm have suffered considerably for over a year now, trying to defend Wilson against a massive civil rights action.

By virtue of recent court decisions, I believe that every one of your flanks is vulnerable, so to speak. To me, it seems that now the officials of your police departments, rather than just performing their duties in good faith, must be nearly perfect. The actions of officials of your housing authorities must now be nearly perfect. At every level of municipal administration, the acts of employees must be, to me, unreasonably spit-polished. Otherwise, you may get an invitation to State or Federal court—at no small expense to city coffers. We on the State level suffer that same dilemma.

The maladies that confront cities as a result of the section 1983 actions are bad enough; but now, of course, your clients face the threat of having attorney's fees assessed against them under new, and more serious, circumstances. Section 1988, of course, was amended roughly 5 years ago to provide for fees payments. Since then, the section has always concerned us, as well as you, to a considerable extent. But since June of last year, when the decision came down from the United States Supreme Court in *Maine* v. *Thiboutot*,[1] our concern and your concern has begun to approach alarm. Prior to *Thiboutot*, it was generally accepted that fees awards were proper in cases where a plaintiff had proven merit in his allegations that his constitutional rights had been violated by a Government official.

He was entitled to relief if he could show that a State official, acting under color of law, had deprived him of any rights or privileges under the constitution and laws. The frightening thing about the *Thiboutot* decision is that it reexamined the term "and laws", as that term is employed in section 1983, and held that the term no longer should be construed to mean equal protection laws only. The devastating effect of the decision lies in the fact that, now, State, county, and municipal officials who violate, not only equal protection laws, but many other federal statutes as well, subject their governmental entity to the fees awards in 1983 litigation. There no longer needs to be a finding by the Federal court that a State official has violated a constitutional right before fees can be awarded. Simple allegation and proof of the fact that a Federal statute has been violated by a State official is sufficient, in many cases, to merit payment of the fees to a prevailing party—"prevailing party", incidentally, is a term which has been defined by the courts in a disturbingly liberal way.

The dissent to the *Thiboutot* decision, written by Justice Powell, was firm. The dissent pointed out the fact that no fewer than 28 joint Federal-State programs are in effect in the nation today. Under these programs, local officials are quite often obligated to comply with the wishes of Federal officials as to how the programs should be administered. But a court finding that a program has been improperly administered in some way, whether in good faith or not, can subject the local governmental entity to liability for attorney's fees. I find it very interesting that the Federal Government has seen fit to leave itself exempt in such a situation, leaving the local governments with the burden of shouldering alone what I fear could become a totally unjustifiable drain on their revenues.

In 1960, only about 300 Federal suits were filed under the Civil Rights Acts. Compare that with 1976, when the number of suits reached epic proportions. Out of a total of 56,822 private Federal question cases filed in the district courts, 17,543—almost one out of every three—were civil rights suits claiming constitutional protection against State and local officials.

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[1] 448 U.S. 1 (1980).

According to statistics compiled by the National Institute of Municipal Law Officers (NIMLO), over $4 billion in section 1983 damages claims are now pending against the cities and towns of this country.

I have touched on the burdens placed upon you by 1983 litigation itself. I don't maintain that I support the developments in this area of the law, but somehow I had almost become conditioned to expect them. I cannot, however, in good conscience accept without objection the latest developments coming from *Thiboutot*. I cannot accept the Federal Government's requiring your client cities or the state to attempt operation within reasonable budgetary restraints while including in their budgets a line item to cover, each year, a liability for attorney's fees that will remain unpredictable and unbearable. I cannot accept judicial mandates or congressional directives that encourage plaintiffs' attorneys to move for fees awards that reimburse expert witnesses for their dog kennel expenses or attorneys for weekends spent at mountain resorts for the purpose of "planning strategy."

I might add that many members of my staff are suspicious that future 1983 actions alleging violations of State statutes will also be found by the U.S. Supreme Court to merit payment of attorney's fees under section 1988. There is already some lower court precedent for this.

We have simply gotten to the point in this society today where good faith acts, mistaken though they may be, on the part of government officials can spell financial disaster for the government entity for which they work. That is simply no way for good government to function—if it can function in that atmosphere, and I am not sure it can—and the situation simply calls for some responsible action on the part of me and you and every other citizen of this state and country who possesses the expertise and the experience necessary to really understand what has happened in this complicated area of the law. I am not going to remain inactive on this issue—I need your help—Lord knows, you've got mine.

Since last September I have been cochairman of a Committee for the National Association of Attorneys General to study the possibility of amending sections 1983 and 1988. In Jackson Hole, Wyo., last month, that association adopted a resolution to the Congress to do something about the growing challenge that confronts you—and us at the State level.

I have had Jim Wallace, my deputy for legal affairs, lobbying on Capitol Hill off-and-on for over 10 months now. As a matter of fact, he testified yesterday before the Senate Judiciary Committee's Subcommittee on the Constitution. I was once counsel to that subcommittee, working for a man you all know, and, I hope, revere, Senator Sam Ervin.

What are we pushing for? We want to make sure that future civil rights actions are indeed just that, in order to spare you as much unnecessary litigation as possible and in order to keep you from being subjected to attorney's fees awards in cases that have nothing to do with civil rights violations. We want some good faith defenses returned to civil rights litigation, so that your clients don't have to continue functioning under a cloud of paranoia. And I am committed to a drastic change in the law as it now relates to astronomical attorney's fees payments. I specifically propose amending section 1983 to allow for actions under that section only when a person's constitutional rights or rights protected by equal protection laws are violated, not so-called rights created by nearly every existing State and Federal statute. Further, I propose amending section 1988, so that it awards attorney's fees only in situations where bad faith on the part of Government officials can be shown.

We are working with the Congress because I am convinced that the solution can only come from Congress. I don't necessarily mean to say that I disagree with what Congress did when it enacted section 1988. Rather, what I am desperately trying to do, through my office, is to educate the congress on just how awry the application of this statute has gone. It has been used to subject governmental entities to unreasonable obligations; and it simply must be amended. What we are talking about plainly and simply, is some good old fashioned realistic fiscal responsibility, so that you people can get on with the job of good Government.

Now I want to, and I need to, take a minute here to digress a bit. If you have gotten the impression that I am here to oppose civil rights, you are wrong—I am not. And I don't oppose an improvement in the quality of life for all of our people. But I can get pretty angry when I see millions of dollars a year paid out of city, county, and State treasuries for attorney's fees in civil rights actions instead of going toward improvements in the quality of life that lawsuits of a civil rights nature were originally intended to bring about. I want the record clear on that. I hope you consider me a practical attorney general of the State of North Carolina, and I just like to think that I have a little bit of common sense and a basic sense of fairness; and I like to think that I have some small influence in the way that things get done.

On the litigation level, of course, we certainly can't try all of your lawsuits for you. But we do have staff members who are attempting to keep abreast of the trends in the attorney's fees area, and I would hope that you will take advantage of their expertise, if you have any questions about those trends. Please feel free to call Jim Wallace of my staff or Tiare Smiley. We've kept them on the subject for some time now—they have done a lot of reading—and there is no reason to let all of that reading go to waste.

Also, please let us know of any specific problems you are having with the attorney's fees trend. If we are going to fight abuses, we must be able to point them out. And, please, please, let our people in Washington know about what we are going through. You all know how important that type of communication is an what can be accomplished by it.

As a closing note, let me stress once more—you are not out there alone. Other attorneys are going through the same thing you are going through in these cases, and that includes the members of my staff. But together I know we can get something done, if we'll just keep at it. I see of no reason why we cannot remedy the situation that I have spoken on today and, at the same time, arrive at some reasonable solutions to the inequities that certain statutes were initially intended to eliminate. But it will take a united—bipartisan, if you will—effort on the part of a lot of people. I'm willing to work with anybody to accomplish certain ends in this area, because, as somebody once so appropriately said—we may have come over on different ships, but we're all in the same boat now.

Thank you,

Mr. **Ormsby**. Thank you, Mr. Wallace.

As Senator Hatch said, he would like me to ask some questions which any of you that wish to may answer. I am of course including Mr. Murphy in that.

First of all, especially in light of the Reagan administration's apparent plans to delegate more responsibilities to the States, what are the implications that you feel the decision in *Thiboutot* has for the principle of federalism and the relationship between Federal, State, and local governments?

Mr. **Eikenberry**. I might make one comment along that line. In beginning my term in office, we identified a number of goals and objectives that we felt were policy areas that the office of attorney general very legitimately should address. One of them was this matter of federalism.

The concern being expressed in a number of places, including the conference of State legislatures, is that the viability of our federalism in this country is being seriously eroded in the Congress, in the executive branch, and in the courts, and that we should do everything we can to contradict that trend in order to make this a better country to live in.

Frankly, that is why we decided to spend the money, the travel time, and so on to be here today, to appear before you and to comment on that whole matter. We think this section 1983 and section 1988 of title 42 is a typical example of where our concept of federalism has been seriously eroded. Unless the Congress takes the step of reversing the trend that has occurred in the courts, it will become worse.

I would like to ask Mr. Murphy, who has been doing the research on this matter, if he would comment.

Mr. **Murphy**. Thank you.

Mr. Ormsby, if I could respond to that question as well with this thought: In the context of the impact on federalism of the application of the *Maine* v. *Thiboutot* problem, it cannot be overlooked. I emphasize this most sincerely when speaking to the U.S. Congress. It simply cannot be overlooked that Congress in its wisdom has deemed it unnecessary to make Federal officers in the U.S. Government liable for the same things that they have made the States and municipalities liable for.

Again, in the context of its impact on federalism, we have examples in the States of State officers undertaking to carry out orders issued by Federal officers, which orders themselves were subsequently found to be in violation of Federal statutes, but in some cases the Federal officers, in the context of regulatory actions or the adoption of rules and regulations, had to have known that they were on the outer edge of their statutory authority.

Yet they issue orders which State officers are bound to obey or challenge the Federal action and risk losing State funding for a program. The Federal orders are subsequently found to be invalid under Federal law. Guess who pays the judgment and guess who pays the attorneys' fees resulting from that judgment when the Federal Government has deemed fit to immunize its own employees?

That is the impact on federalism. That is what drives a lot of State defense attorneys up the wall. We very often have to carry out orders issued to us, or our clients, by Federal administrative officials under circumstances where they must know that there is very questionable statutory authority for what they are ordering the States and municipalities to do. Guess who is left holding the judgment and paying the attorneys' fees?

Senator DeConcini [acting chairman]. As long as we have gotten into the attorneys' fees issue, the advocates of the Fees Act also point to the provision providing attorney fees to defendants as insurance that section 1988 would not provide incentive for the bringing of frivolous suits. Has this worked in limiting frivolous suits brought under 1983?

Mr. Murphy. I do not think it has, Senator DeConcini. I guess I am one of the exceptions. I won a 1983 case in the Federal district court in Seattle in January of this year and persuaded the judge to award the State of Washington $5,000. I asked for $11,000 and she gave us $5,000 in attorneys' fees. As you might surmise, that case is on appeal at this point in time.

However, I think the answer is no. The cases seem overwhelmingly to stand for the proposition that different circumstances apply to the public defendants. For example, in testimony given earlier today, Senator DeConcini, the fact that a plaintiff in one of our own cases in the State of Washington is a public subdivision, a school district fully funded by the State of Washington, and thus the State has already paid twice for this litigation, once for the plaintiff and once for the defendant, and the fact that that litigation has been 100 percent funded by Washington State public funds was not in the views of the 9th Circuit Court of Appeals special circumstances enough to permit denial of an attorney's fee award to that public agency.

Yet when the defendant prevails, we must clearly demonstrate—we have a burden of proof, so to speak—that the lawsuit was brought for purposes of harassing a public official, was brought for vexatious purposes, or was brought with actual malice against the State or municipal officer.

I think it is not much of a deterrent, Senator DeConcini. The award of attorney fees to prevailing—and I would put that in the largest quotation marks you can find in the print shop—parties is virtually automatic. It is a Federal entitlement, if you will. It has become a transfer payment. Attorneys who can bring themselves to sign a complaint are almost assured of being compensated somehow. Yet when the municipality or State prevails, it is very, very difficult to recover attorney fees.

Mr. WILKINSON. Senator DeConcini, let me illustrate that by a case from your own State. I referred earlier to the fact that Mr. Anthony Ching of the Arizona attorney general's office has been a member of the committee of the National Association of Attorneys General which put together the bible of all the documents generated by that association on this subject.

He refers us to the case of *White Mountain Apache Tribe* v. *Bracker*, a 1980 case with which you may be familiar. In that case, the U.S. Supreme Court held that the State of Arizona was preempted by Federal law from applying its motor carrier license tax to the activities of the Pinetop Logging Co. carried on exclusively within the exterior boundaries of the Fort Apache Indian Reservation.

Pinetop had paid its taxes under protest and then brought suit in the courts of the State of Arizona. An earlier action had been filed in the Federal court but had not been prosecuted. The litigation proceeded then initially by summary judgment motion—so there was not a lot of trial time—entirely through the State courts with no hint of anything approaching a section 1983 claim.

After it succeeded in the U.S. Supreme Court, the attorneys representing the tribe persuaded the U.S. district court—keep in mind there had not been a suit prosecuted in the district court—to award them $206,000 in attorneys' fees for work performed clear back to 1969, even though no issue was ever litigated in the Federal court, no section 1983 type issue was ever litigated in any court, and the work was performed, at least prior to arriving at the U.S. Supreme Court, entirely in the State court system.

The district court's reasoning was interesting. It was that section 1988, instead of providing for costs, creates a separate cause of action independent of their being a suit to accompany the claim for costs. It also allowed for the retroactive application for this cause of action for work performed 5 years prior to the enactment of the 1988 statute in 1976.

The courts are bending over backward to find some way to award attorneys' fees.

Senator DECONCINI. I was not aware of that case. I know Tony Ching very well.

Mr. MURPHY. Senator, if I might just supplement one remark that Attorney General Wilkinson has made, with respect to the *White Mountain Apache* v. *Bracker* case, 39 States have just last week filed an amicus brief in the 9th Circuit Court of Appeals in support of Arizona in that case. As far as I know, that is a record in the National Association of Attorneys General to get 39 States. Seven States said they did not get it brought to their attention early enough and wanted to sign, too.

Senator DECONCINI. It is almost enough to have a constitutional convention.

Mr. MURPHY. I am sorry I brought it up.

Mr. WILKINSON. Senator DeConcini, may I repeat a statement I made before you came in? Judge O'Connor, before she was nominated, wrote an article appearing in the William and Mary Law Review on the problem of section 1983 and 1988 in which she took the position that perhaps the greatest harm being done by the way the courts have applied these two sections is to the concept of federalism. Federal courts are just running roughshod over the States.

Senator DECONCINI. I want to read that. Thank you.

Mr. WALLACE. Senator, the only thing I wanted to bring up was the amicus situation from Arizona. I do not need to make any further comment on that question.

Senator DECONCINI. Gentlemen, thank you very much for your testimony. We have a few questions that we may submit to you for your response. We are running a little short of time here. We appreciate your fine presentation and your taking the time and preparation to present it today. It is very helpful to the committee. I compliment you for you commitment here.

Mr. WILKINSON. Might I just add that I just saw your good friend General Corbin yesterday.

Senator DECONCINI. I know him well.

Mr. WILKINSON. He knew we were coming here. He asked to be remembered to you.

Senator DECONCINI. Thank you.

Mr. WILKINSON. Even though our association consists of attorneys general who cover the spectrum of political thought, we are unanimous in the views expressed here today.

Senator DECONCINI. I am glad to hear that. Thank you.

We will now hear from Mr. Heinz Hink, a council member and mayor pro tem of the city of Scottsdale. Mr. Hink is testifying on behalf of the National League of Cities. The National League of Cities represents nearly 15,000 of our Nation's cities.

Mr. Hink, we are pleased to have you here representing such an organization. Your distinguished career on the city council of Scottsdale precedes your appearance here. Having known of your involvement in the League of Cities and Towns and in legislation, we welcome you here today.

If you have a statement of great length, we would be glad to put it in the record following your oral presentation. If you would like to summarize it for us, we would like to have you stress your underlying points.

STATEMENT OF HEINZ HINK, COUNCIL MEMBER AND MAYOR PRO TEM, SCOTTSDALE, ARIZ., AND REPRESENTING THE NATIONAL LEAGUE OF CITIES

Mr. HINK. Thank you very much, Senator. I shall try not to be as loquacious as some of my predecessors. I shall make my prepared statement part of the record.

I do have a very personal and very longstanding interest in the subject. I have always felt—in fact, I wrote a doctoral dissertation on this some 25 years ago—that sovereign immunity has no place in the system of constitutional government. It is pernicious. It is uncalled for.

The great Oliver Wendell Holmes, who was right most of the time, was wrong when he said that the government cannot make itself actionable before the courts of its own creation, which just goes to show that great man have feet of clay, too.

However, I think we have gone to the extreme in the other direction. We are intimidating people who act in good faith. We are discouraging qualified people from seeking public office and from working with government, because of the threat which faces them under the guise of civil rights action.

The issue is not civil rights. I am all in favor of civil rights. So is every other responsible public official in this country. The issue is not the protection of civil rights. The issue is that section 1983 has been abused by people, not to enforce civil rights but to bring what often are frivolous actions against government or governmental entities and against public officials.

In my own city of Scottsdale, the police went and removed some newspaper racks from a right-of-way because they felt that they impeded traffic. The person who owned the newspaper sued the city under section 1983 and asked for $50,000 damages from the mayor and each member of the council individually because he said by removing news racks we violated his constitutional rights and his civil liberties under section 1983.

Two months ago, a church sued us in a zoning case because the majority of the city council felt that the traffic which would be created by allowing a use permit to this particular church in this particular location would be detrimental to the neighborhood. Therefore, city counsil decided that this particular church should look for a different location and ought not to be issued a use permit to build on the site they had chosen. The diocese sued under section 1983.

People in this country have become overly litigious. They do not try and find reasonable solutions anymore by talking to each other. They pay their $20 court fee and file a lawsuit.

In my judgment, that is detrimental to the true civil rights which need to be protected. I think you have to restore some of the reasonable common law standards whereby people acting in good faith have a reasonable defense.

The principal purpose of section 1983 ought to be the protection of civil rights. Civil rights need to be protected because they have been violated in our society. However, you can more readily obtain that by not permitting section 1983 to be abused for purposes which are really immaterial to the protection of civil rights.

The National League of Cities, I can assure you, recognizes the need of protecting basic civil rights. We have gone on record repeatedly with statements not only, for instance, endorsing equal employment opportunities but also equity in benefits from the provision of public services.

However, we also feel that the Congress of the United States has a responsibility to prevent section 1983 from becoming a catch-all remedy rather than a primary protector of civil rights. There has been a tremendous proliferation of suits. In my judgment, some of them are very clearly frivolous in and will force the courts to carve up the statute with exceptions and limitations.

We are concerned with the lack of certainty and predictability of the law and of our obligation under the law under section 1983. We are of the opinion that, in fact, Congress has abdicated its responsibility to circumscribe liability under section 1983 by leaving that issue to the courts. The courts do not have clear policy guidelines from Congress. The courts have to rely on a combination of specific words of the statute and the rather sparse legislative history. The statute is very broadly drafted.

In fact, the truth of the matter is, speaking for myself and not for the League of Cities, it is really bad policy to take a statute which has been around for 100 years, and which has not been enforced when it should have been enforced because we did not have more recent legislation, and then all of a sudden to revise it, to take a law written in 1871, which for almost 100 years nobody enforced, and then to enforce it by giving it the construction of 1981. I think that is very bad policy.

I think if we do not have adequate civil rights legislation to protect civil rights, the Congress ought to pass it by amending the 1964 statute. I do not think we ought to go back and take a law which has been on the books without being enforced for almost 100 years.

Senator DeConcini. Let me ask you a question before you go on. You gave us some examples in Scottsdale. How many 1983 suits have been filed or are now pending that you know of against Scottsdale, and what is the dollar amount?

Mr. Hink. Senator, I would say we have probably had 15 or 20. Many of them are settled. We had a man who had been in jail for murder. He was convicted and then was released. He had left a car sitting around for a period of time with expired license plates. Finally something happened and the police impounded it. He brought an action under section 1983 charging that the police violated his civil rights because they impounded his car.

The insurance company paid him $9,500 because it is cheaper to pay the $9,500 than to go to court because the municipality, the government entity, almost never recovers lawyers' fees in cases like this. The burden of proof that the government has to meet to show that the suit was frivolous is almost impossible to meet.

Senator DeConcini. What is the dollar amount pending now? Do you have any rough estimate?

Mr. Hink. Potentially, the lawsuit involving the church, which I think has become moot because we did give them the building permit last night, but I think the threat——

Senator DECONCINI. However, you are going to have to pay attorneys' fees on that, right?

Mr. HINK. Oh, yes. The potential damages were in the millions of dollars. The Hillside ordinance, which is in appellate court now and involves a due process question—I do not think it specifically involves section 1983, but potentially could—is for $15 million.

Senator DECONCINI. Is it a substantial amount?

Mr. HINK. Yes. There was a case involving a traffic light that we would not put in a number of years ago which was a violation of someones civil rights and was for $15 million in damages.

Senator DECONCINI. You say a traffic light?

Mr. HINK. Yes.

Senator DECONCINI. You were sued because you failed to put in a traffic light?

Mr. HINK. Yes. In this country, we also encourage the filing of lawsuits for frivolous amounts of damages because we do not require plaintiffs to pay a percentage of the amount in controversy as part of the court fees.

If we were to do what some European countries do and ask for a percentage, so that if you sued for $15 million, 1 percent would cost you $150,000 to file, we would discourage this.

However, a very interesting combination of people oppose that: The plaintiff lawyers and the reform groups who say that that would make it impossible for poor people to obtain justice.

Senator DECONCINI. Please continue.

Mr. HINK. There is tremendous concern. I have heard this repeatedly. I am presently serving as president of the Arizona League of Cities and Towns. At any meeting which we have, there is tremendous concern about the exposure that individuals have to personal liability under section 1983. You have to realize, as of course you do in representing my State, that most people, even in a town of 20,000 or 30,000, serve for practically no compensation. This is public service. If they get paid $50 a month, they are lucky. I think we have discouraged some very fine people from seeking public office simply because they are smart enough to realize the kind of exposure they have to liability under section 1983.

Senator DECONCINI. You are talking about personal liability?

Mr. HINK. Personal liability for things you have done in good faith.

If I may, Mr. Chairman, I would like to emphasize that I am not opposed to people being responsible for a wrong which they commit. All I am saying is—and this applies not only to the cities but the States as well—that I think the law and the interpretation given to it by the courts goes too far in making cities, States, and public officials liable for things which have been done in good faith. I think the common law defenses that are otherwise available in court actions ought to be restored.

This is not only ruinous to governmental entities and to cities which may have to face very severe budgetary constraints if a substantial judgment is entered against them, but I think this is very, very demoralizing to individuals.

Senator DECONCINI. Is liability insurance available to municipalities or any governments?

Mr. HINK. No, Senator.

Senator DeConcini. Is it prohibitively expensive or is it just unavailable?

Mr. Hink. In Arizona, after sovereign immunity was removed by *Stone v. Highway Commission* in 1964, the insurance premiums quadrupled. When section 1983 actions began, cities simply could not obtain liability insurance for any amount of money.

Senator DeConcini. You cannot get liability insurance for that?

Mr. Hink. No.

Senator DeConcini. Are you indemnified by the city?

Mr. Hink. We are self-insured.

Senator DeConcini. You are self-insured? You and other members of the council carry your own insurance?

Mr. Hink. Yes. I carry personal insurance.

Senator DeConcini. You pay for that out of your own pocket and are not reimbursed?

Mr. Hink. Yes; if you look at the *Rhodes* case, the liability is a personal one.

Senator DeConcini. Sure.

Mr. Hink. The Supreme Court, in effect, has said that the city or the State could not even reimburse you if you are found liable.

Senator DeConcini. Let me ask another question that comes to mind. Maybe you can help the committee. What does this do to the decisionmaking process of members of the city council? It must affect their decisionmaking process to some extent, particularly if there has been any threat, hint, or discussion of a civil rights case, when they know they are personally liable. Is that true? Does it come into it and does it affect the policy decisions and have you witnessed that?

Mr. Hink. I am sorry to say, Senator, that I have to answer you in the affirmative.

Senator DeConcini. Therefore, sometimes you are acting under some intimidation or threat.

Mr. Hink. Yes; I think people make a very honest effort not to feel threatened, but I think at the same time they cannot helpbut feel threatened.

I happen to have been in favor of giving the use permit to that particular church in the first place, but I have absolutely no doubt but that the change on the part of the majority of the council in part had something to do with the fact that they and their wives personally were sued for damages under section 1983.

The way in which we permit political, social, and economic issues to have legal tangents makes it plausible to include almost anything under section 1983. Anything which anybody does or does not do, especially if it is somebody in government, you can almost automatically include under an alleged civil rights violation and threaten and intimidate somebody. I think we have to restore some reasonable defenses against these actions.

Senator DeConcini. Thank you. Do you have anything further?

Mr. Hink. I have written testimony, but that is essentially the thrust of what I have to say.

Senator DeConcini. Without objection the written testimony will appear in the record following your oral presentation. I want to thank you, Mr. Hink, and I wish you would express our appreciation to the city council of Scottsdale and to the Arizona League of

Cities and Towns as well as the National League in bringing these important nuts and bolts operations of local government, to which, I think, we are all committed to, and want to see function in the best spirit of democracy before this subcommittee. Your testimony is very helpful. Thank you.

Senator Hatch does have some questions which we will submit to you that you might be able to answer for him. You can get them back to us later. We will send them to you.

[Material follows:]

PREPARED STATEMENT OF HEINZ R. HINK

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: I AM HEINZ R. HINK, A MEMBER OF THE CITY COUNCIL AND THE MAYOR PRO TEM OF SCOTTSDALE, ARIZONA, APPEARING ON BEHALF OF THE NATIONAL LEAGUE OF CITIES. NLC REPRESENTS NEARLY 15,000 CITIES THROUGH DIRECT MEMBERSHIP AND MEMBERSHIP IN 48 AFFILIATED STATE MUNICIPAL LEAGUES. I AM ALSO A MEMBER OF THE NLC'S FINANCE, ADMINISTRATION, AND INTERGOVERNMENTAL RELATIONS STEERING COMMITTEE.

I AM HERE TODAY TO DISCUSS THE POSITION OF THE NATIONAL LEAGUE OF CITIES ON AMENDING THE CIVIL RIGHTS ACT OF 1871 TO DEFINE AND LIMIT THE LIABILITY OF MUNICIPAL GOVERNMENTS AND THEIR OFFICIALS AND EMPLOYEES. NLC HAS MADE PASSAGE OF SUCH LEGISLATION A TOP PRIORITY FOR 1981.

WITH YOUR PERMISSION, MR. CHAIRMAN, I WOULD ADD THAT I HAVE A LONGSTANDING, PROFESSIONAL, AND PERSONAL INTEREST IN THE SUBJECT OF PUBLIC LIABILITY. I AM A PROFESSOR OF POLITICAL SCIENCE AT ARIZONA STATE UNIVERSITY WHERE I WROTE MY DOCTORAL DISSERTATION ON THE COMPARATIVE ASPECTS OF GOVERNMENTAL LIABILITY. I HAVE URGED AS LONG AS 25 YEARS AGO THAT THE DOCTRINE OF SOVEREIGN IMMUNITY IS PERNICIOUS AND SHOULD HAVE NO PLACE IN A SYSTEM OF CONSTITUTIONAL GOVERNMENT. HOWEVER, THE EXTENSIVE EXPOSURE OF GOVERNMENTAL ENTITIES AND PUBLIC OFFICIALS BROUGHT ABOUT BY RECENT SUPREME COURT DECISIONS RAISES QUESTIONS IN MY MIND WHETHER THE PENDULUM HAS NOT GONE TOO FAR IN THE OTHER DIRECTION. THE THREAT OF PERSONAL EXPOSURE AND POTENTIAL FINANCIAL RUIN TO ONE'S FAMILY FOR ACTS PERFORMED IN GOOD FAITH CANNOT HELP BUT HAVE A STIFLING IMPACT ON A PERSON'S DECISION TO ENTER PUBLIC SERVICE.

THE CIVIL RIGHTS ACT OF 1871 (42 U.S.C. §1983), SOMETIMES REFERRED TO AS THE KU KLUX KLAN ACT, WAS INTENDED TO ALLOW FOR CIVIL ACTIONS FOR DEPRIVATIONS OF CONSTITUTIONAL RIGHTS CAUSED BY INDIVIDUALS ACTING "UNDER COLOR OF STATE LAW". AS A RESULT OF NARROW COURT INTERPRETATIONS OF THE STATUTE UNTIL 1961, IT WAS RELATIVELY INEFFECTIVE IN PROVIDING PROTECTION FROM OFFICIALLY

SANCTIONED VIOLATIONS OF CONSTITUTIONAL RIGHTS. BEGINNING IN 1961, HOWEVER, SECTION 1983 LITIGATION EXPLODED, WITH FILINGS UNDER THE STATUTE GOING FROM 296 IN 1961 TO 13,168 IN 1979 (NOT INCLUDING SECTION 1983 FILINGS BY STATE PRISONERS WHICH ROSE FROM 218 IN 1966 TO 11,195 IN 1979).

CITY OFFICIALS HAVE BECOME INCREASINGLY CONCERNED BY THE INABILITY OF COURTS TO LIMIT ACCESS TO THE FEDERAL COURTS UNDER SECTION 1983. THE SHEER VOLUME OF LITIGATION AND THE UNPREDICTABILITY OF DEVELOPMENTS IN SECTION 1983 LAW MAKE OBTAINING INSURANCE EITHER IMPOSSIBLE OR PROHIBITIVELY EXPENSIVE. ALTHOUGH WE DO NOT KNOW HOW MUCH SECTION 1983 LITIGATION IS ACTUALLY COSTING CITIES AND THEIR OFFICIALS AND EMPLOYEES IN DAMAGES AND LEGAL COSTS, WE CAN EXTRAPOLATE FROM THE NUMBER OF FILINGS AND THE UNAVAILABILITY AND HIGH COST OF INSURANCE AND CONCLUDE THAT SECTION 1983 IS IMPOSING NEARLY UNMANAGEABLE MANDATES ON MUNICIPAL GOVERNMENTS AND THEIR OFFICIALS AND EMPLOYEES.

CONGRESS HAS YET TO ASSUME RESPONSIBILITY FOR THE PROBLEMS SECTION 1983 IS CAUSING MUNICIPAL GOVERNMENTS. THE COURTS HAVE REPEATEDLY SIGNALLED THAT THEY WILL CONTINUE TO EXPAND SECTION 1983 UNTIL CONGRESS DIRECTS OTHERWISE. CLEARLY THE TIME HAS COME FOR CONGRESS TO MAKE THE NECESSARY CHANGES TO SECTION 1983 THAT WILL RECOGNIZE ITS REAL PURPOSE, THE PROTECTION OF CONSTITUTIONAL RIGHTS, WITHOUT UNDUE BURDENS FOR GOVERNMENTAL OFFICIALS. OTHERWISE, PLAINTIFFS WILL CONTINUE TO USE SECTION 1983 FOR A WIDE RANGE OF INAPPROPRIATE PURPOSES, DILUTING ITS EFFECTIVENESS AS A BASIC CIVIL RIGHTS LAW, AND THE DUTY OF GOVERNING WILL BE INCREASING DIFFICULT.

I. BACKGROUND

SECTION 1983 IS A SHORT AND SIMPLE STATUTE WHICH STATES: "EVERY PERSON WHO, UNDER COLOR OF ANY STATUTE, ORDINANCE, REGULATION, CUSTOMS, OR USUAGE, OF ANY STATE . . ., SUBJECTS OR CAUSES TO BE SUBJECTED, ANY . . . [PERSON] . . . TO THE DEPRIVATION OF ANY RIGHTS, PRIVILEGES, OR IMMUNITIES SECURED BY THE CONSTITUTION AND LAWS, SHALL BE LIABLE . . . IN AN ACTION AT LAW, SUIT IN

EQUITY . . . " UNTIL THE SUPREME COURT'S LANDMARK DECISION IN MONROE V. PAPE, 365 U.S. 167 (1961), THE STATUTE DID NOT PROVIDE A SIGNIFICANT CIVIL RIGHTS REMEDY DESPITE THE BROAD REMEDY IT APPEARED TO PROVIDE FOR VIOLATIONS OF CONSTITUTIONAL RIGHTS UNDER THE SANCTION OF STATE OR LOCAL GOVERNMENT. PRIOR TO MONROE, SECTION 1983 WAS VERY NARROWLY CONSTRUED. IN MONROE, THE COURT HELD THAT SECTION 1983 PROVIDES A REMEDY FOR OFFICIALLY-SANCTIONED VIOLATIONS OF CONSTITUTIONAL RIGHTS, WHETHER OR NOT THE CHALLENGED ACTIONS ACTUALLY WERE AUTHORIZED BY STATE LAW, AND PERMITS A FEDERAL CAUSE OF ACTION EVEN IN THOSE CASES WHERE STATE LAW PROVIDES AN ADEQUATE REMEDY UNDER ITS TORT LAWS.

A. INDIVIDUAL LIABILITY

MONROE ALSO LIMITED LIABILITY UNDER SECTION 1983 TO INDIVIDUAL STATE AND LOCAL OFFICIALS AND EMPLOYEES. THE LAW DEVELOPED GRADUALLY OVER THE NEXT TWENTY YEARS AS THE COURTS DEFINED WHICH COMMON LAW IMMUNITIES AND DEFENSES WERE AVAILABLE TO INDIVIDUAL STATE AND LOCAL OFFICIALS AND EMPLOYEES. THIS PROCESS WAS NECESSARY BECAUSE SECTION 1983 DID NOT MAKE ANY REFERENCE TO OFFICIAL IMMUNITIES. THE SUPREME COURT HAD TO RELY ON COMMON LAW TO DEVELOP OFFICIAL IMMUNITIES FOR INDIVIDUALS SUED UNDER SECTION 1983. HISTORICALLY, IMMUNITIES HAVE BEEN PROVIDED TO ENSURE THAT PUBLIC OFFICIALS WILL BE ABLE TO MAKE DIFFICULT DECISIONS WITHOUT FEAR OF PERSONAL LIABILITY. IN DEVELOPING SECTION 1983 IMMUNITIES, THE COURTS HAVE OFTEN BALANCED THIS INTEREST AGAINST THE NEED TO FULFILL THE FUNDAMENTAL PURPOSES OF SECTION 1983.

AT THE PRESENT TIME ONLY THREE CLASSES OF OFFICIALS HAVE ABSOLUTE IMMUNITY UNDER SECTION 1983: STATE LEGISLATORS, PROSECUTORS, AND JUDGES. LOCAL LEGISLATORS AND STATE AND LOCAL EXECUTIVE AND ADMINISTRATIVE OFFICIALS HAVE ONLY PARTIAL OR QUALIFIED IMMUNITY.

IN TENNEY V. BRANDHOVE, 341 U.S. 367 (1951), THE SUPREME COURT GAVE ABSOLUTE IMMUNITY TO STATE LEGISLATORS. THE SUPREME COURT HAS NEVER EXTENDED THIS ABSOLUTE IMMUNITY TO LOCAL LEGISLATORS

SUCH AS CITY COUNCIL, SCHOOL BOARD, OR PLANNING COMMISSION MEMBERS. IN SEVERAL CIRCUITS, APPELLATE COURTS HAVE REFUSED TO PROVIDE LOCAL LEGISLATORS WITH THE LEGISLATIVE IMMUNITY. AS A RESULT, LOCAL LEGISLATORS ARE EXPOSED TO SECTION 1983 LIABILITY WHILE STATE LEGISLATORS ARE NOT. LOCAL LEGISLATORS MUST RELY ON THE QUALIFIED (OR GOOD FAITH) IMMUNITY AS THEIR PRIMARY DEFENSE.

STATE AND LOCAL EXECUTIVE (OR ADMINISTRATIVE) OFFICIALS CAN BE IMMUNE UNDER THIS QUALIFIED IMMUNITY WHEN THEY HAVE ACTED WITHIN THE SCOPE OF AUTHORITY, REASONABLY AND IN GOOD FAITH. THIS IS AN AFFIRMATIVE DEFENSE WHICH MUST BE PROVED BY THE DEFENDANT OFFICIAL. MOREOVER, THIS QUALIFIED IMMUNITY FOR EXECUTIVE OFFICIALS UNDER SECTION 1983 IS LESS THAN WHAT THEY ENJOY UNDER COMMON LAW. IN SCHEUER V. RHODES, 416 U.S. 232 (1974), THE COURT RULED THAT THE SCOPE OF THIS IMMUNITY VARIES AND DEPENDS UPON THE AMOUNT OF DISCRETION AND RESPONSIBILITY THE OFFICIAL IN QUESTION HAS AND THE REASONABLENESS OF HIS BELIEF IN THE LEGALITY OF HIS CONDUCT.

TO SUMMARIZE, INDIVIDUAL MUNICIPAL OFFICIALS MAY BE PERSONALLY LIABLE UNDER SECTION 1983. UNLIKE STATE LEGISLATORS, THEY ARE NOT CLEARLY PROTECTED BY THE ABSOLUTE LEGISLATIVE IMMUNITY. INDIVIDUAL OFFICIALS AND EMPLOYEES MAY INVOKE A QUALIFIED EXECUTIVE IMMUNITY FOR NON-LEGISLATIVE DECISIONS, BUT THE STANDARD GOVERNING THIS IMMUNITY IS VARIABLE AND DEPENDS UPON THE CIRCUMSTANCES OF THE CHALLENGED DECISION OR ACTION.

B. GOVERNMENTAL LIABILITY

IN MONELL V. DEPARTMENT OF SOCIAL SERVICES, 436 U.S. 658 (1978), THE SUPREME COURT OVERRULED PART OF MONROE AND DETERMINED THAT MUNICIPAL GOVERNMENTS MAY BE LIABLE UNDER SECTION 1983 WHENEVER OFFICIAL POLICIES OR PRACTICES VIOLATED CONSTITUTIONAL RIGHTS. THE SIGNIFICANCE OF THIS HOLDING IS SOMEWHAT LIMITED BY THE COURT'S REFUSAL TO EXTEND RESPONDEAT SUPERIOR LIABILITY (I.E., VICARIOUS LIABILITY FOR ALL THE UNCONSTITUTIONAL ACTIONS OF ITS EMPLOYEES AND OFFICIALS TO LOCAL GOVERNMENTS. THE SUPREME COURT HAS CONTINUED THE TREND OF TREATING STATE AND LOCAL GOVERN-

MENTS DIFFERENTLY EVEN THOUGH LOCAL GOVERNMENTS ARE INSTRUMENTALITIES OF STATES: STATES CANNOT BE SUED DIRECTLY (UNLESS THEY CONSENT) BECAUSE OF THE ELEVENTH AMENDMENT AND THE COMMON LAW DOCTRINE OF SOVEREIGN IMMUNITY. QUERN V. JORDAN, 440 U.S. 332 (1979). IN A LARGE MAJORITY OF STATES, THE DOCTRINE OF SOVEREIGN IMMUNITY HAS NOT BEEN ABROGATED.

UNDER PRE-MONELL LAW, ONLY INDIVIDUAL OFFICERS AND EMPLOYEES COULD BE LIABLE FOR MONETARY DAMAGES UNDER SECTION 1983 AND THEY WERE FREQUENTLY PROTECTED BY THE PERSONAL IMMUNITIES AND DEFENSES DESCRIBED EARLIER SUCH AS THE LEGISLATIVE IMMUNITY, THE QUALIFIED EXECUTIVE IMMUNITY, AND THE GOOD FAITH DEFENSE. IN OWEN V. CITY OF INDEPENDENCE, 445 U.S. 622 (1980), THE SUPREME COURT DENIED MUNICIPAL GOVERNMENTS THE GOOD FAITH DEFENSE. A MUNICIPAL GOVERNMENT MAY NOW BE LIABLE UNDER SECTION 1983 REGARDLESS OF THE REASONABLENESS OF ITS OFFICIALS' BELIEF THAT THE CONDUCT IN QUESTION WAS LEGAL. AS A RESULT, MUNICIPAL GOVERNMENTS ARE FORCED TO ADOPT AND IMPLEMENT POLICY WITHOUT THE ASSURANCE THAT A CAREFUL, REASONABLE, AND APPARENTLY LEGAL POLICY DETERMINATION WILL PROTECT THEM FROM LIABILITY.

FINALLY, IN MAINE V. THIBOUTOT, 100 S.CT. 2502 (1980), THE SUPREME COURT DRAMATICALLY CHANGED THE MEANING OF SECTION 1983 FOR MUNICIPAL GOVERNMENTS BY RULING THAT ITS COVERAGE INCLUDES VIOLATIONS OF ALL FEDERAL STATUTES AS WELL AS OF CONSTITUTIONAL RIGHTS. PRIOR TO THIS RULING, THE COURTS AND SECTION 1983 PLAINTIFFS HAD ASSUMED THAT THE RIGHT TO SUE UNDER SECTION 1983 FOR VIOLATIONS OF "RIGHTS, PRIVILEGES, OR IMMUNITIES SECURED BY THE CONSTITUTION AND LAWS" WAS LIMITED TO VIOLATIONS OF THE CONSTITUTION AND THOSE FEDERAL LAWS ENACTED TO PROTECTION CONSTITUTIONAL RIGHTS. NOW SECTION 1983 PLAINTIFFS MAY SUE LOCAL GOVERNMENTS WHENEVER THEIR POLICIES OR PRACTICES VIOLATE ANY FEDERAL STATUTE.

TO SUMMARIZE, MUNICIPAL GOVERNMENTS MAY BE LIABLE UNDER SECTION 1983 WHENEVER OFFICIAL POLICIES OR PRACTICES VIOLATE A CONSTITUTIONAL RIGHT OR FEDERAL STATUTE. THEY MAY NOT INVOKE THE GOOD

FAITH DEFENSE. THE COURTS HAVE NOT FOUND THAT MUNICIPAL GOVERNMENTS ARE AUTOMATICALLY LIABLE FOR ALL SECTION 1983 VIOLATIONS OF THEIR EMPLOYEES. MUNICIPAL GOVERNMENTS ARE NOT LIABLE FOR PUNITIVE DAMAGES. NEGLIGENT CONDUCT MAY BE SUFFICIENT TO SUSTAIN A SECTION 1983 CAUSE OF ACTION AGAINST A GOVERNMENTAL ENTITY.

II. PUBLIC POLICY CONSIDERATIONS

AS YOU CAN SEE FROM MY CURSORY REVIEW OF WHAT SECTION 1983 HAS COME TO MEAN, THERE ARE MANY AREAS WHERE CORRECTIVE ACTION BY CONGRESS IS CALLED FOR. IT IS CLEAR THAT ONE OF THE REASONS FOR THIS HAPHAZARD DEVELOPMENT OF THE LAW IS THE LACK OF CONGRESSIONAL DIRECTION. BEFORE I DESCRIBE NLC'S SPECIFIC RECOMMENDATIONS FOR AMENDING SECTION 1983, I WOULD LIKE TO STATE NLC'S POSITION ON THE POLICY GOALS THAT THESE AMENDMENTS SHOULD ADDRESS.

A. CIVIL RIGHTS

THE PRINCIPAL PURPOSE OF SECTION 1983 SHOULD BE THE PROTECTION OF CIVIL RIGHTS. THAT GOAL IS MOST READILY OBTAINED BY DETERRING THE ILLEGAL CONDUCT OF MUNICIPAL GOVERNMENTS AND OFFICIALS. NLC HAS RECOGNIZED THE IMPORTANCE OF PROTECTING BASIC CIVIL RIGHTS, DEFINED BY NLC POLICY AS INCLUDING (BUT NOT LIMITED TO) EQUAL EMPLOYMENT OPPORTUNITIES AND "EQUITY IN BENEFITS FROM THE PROVISION OF PUBLIC SERVICES".

WE BELIEVE CONGRESS MUST ACT TO PREVENT SECTION 1983 FROM BECOMING A CATCH-ALL REMEDY, RATHER THAN A PRIMARY PROTECTOR OF CIVIL RIGHTS. THE PROLIFERATION OF SUITS, SOME OF WHICH ARE CLEARLY FRIVOLOUS, UNDER SECTION 1983 IS LIKELY TO FORCE THE COURTS TO CARVE UP THE STATUTE WITH EXCEPTIONS AND LIMITATIONS. BY FOCUSSING SECTION 1983 ON DETERRING ILLEGAL CONDUCT AND CORRECTING ILLEGAL GOVERNMENT PRACTICES, VICTIMS OF SECTION 1983 VIOLATIONS WILL BE ASSURED PROTECTION, CLEARLY THE MOST IMPORTANT FUNCTION OF THE STATUTE.

B. CERTAINTY AND PREDICTABILITY

OF GREAT CONCERN TO MUNICIPAL GOVERNMENTS AND OFFICIALS IS THE LACK OF CERTAINTY AND PREDICTABILITY OF THE LAW UNDER SECTION 1983. THIS IS A DIRECT EFFECT OF CONGRESS' ABDICATION OF

RESPONSIBILITY FOR CIRCUMSCRIBING LIABILITY UNDER SECTION 1983 TO THE COURTS. THE COURTS HAVE NO CLEAR POLICY GUIDELINES FROM CONGRESS AND MUST RELY ON THE COMBINATION OF THE SPECIFIC WORDS OF THE STATUTE AND THE SPARSE LEGISLATIVE HISTORY. SINCE THE STATUTE IS BROADLY DRAFTED, THE NATURAL OUTCOME IS BROADLY DEFINED LIABILITY.

ONE OF THE REASONS COMMERCIAL INSURANCE CARRIERS ARE INCREASINGLY UNWILLING TO ENSURE SECTION 1983 RISKS IS THE UNPREDICTABILITY OF LIABILITY: THE RISK CANNOT BE MEASURED ON THE BASIS OF PAST PATTERNS OF LIABILITY BECAUSE THE LIABILITY IS CONSTANTLY EXPANDING. WE BELIEVE CONGRESSIONAL ACTION IS NECESSARY TO DEFINE THE LIMITS OF SECTION 1983 LIABILITY. THE ESTABLISHMENT OF CLARITY WILL AT LEAST ENABLE INSURERS TO MEASURE RISK AND OFFER INSURANCE COVERAGE.

C. PROTECTIONS FOR MUNICIPAL OFFICIALS AND EMPLOYEES

MANY CITY OFFICIALS HAVE EXPRESSED THEIR CONCERN ABOUT PERSONAL EXPOSURE TO LIABILITY UNDER SECTION 1983. THE COURTS, IN SUCH CASES AS SCHEUER, HAVE ESTABLISHED SPECIAL IMMUNITY STANDARDS UNDER SECTION 1983 FOR PUBLIC OFFICIALS. IN MANY CASES, THE IMMUNITIES UNDER SECTION 1983 PROVIDE MUCH LESS PROTECTION THAN TRADITIONAL COMMON LAW AND STATUTORY IMMUNITIES. AS A RESULT, CITY OFFICIALS OFTEN MUST EXERCISE THEIR TRADITIONAL POWERS--SUCH AS ZONING DECISIONS--WITH VERY REAL TREPIDATION.

WE BELIEVE CONGRESS SHOULD PROVIDE CLEAR IMMUNITIES FOR CITY OFFICIALS SO THEY CAN PERFORM THEIR GOVERNMENTAL FUNCTIONS WITHOUT THE RISK OF UNFORESEEABLE LIABILITY. WE DO NOT SEE ANY PUBLIC POLICY REASONS FOR DISTINGUISHING PERSONAL IMMUNITIES UNDER SECTION 1983 FROM THOSE PROVIDED IN STATE TORT LAW.

D. LIMITED FINANCIAL RESOURCES OF MUNICIPAL GOVERNMENTS

MUNICIPAL GOVERNMENTS DERIVE THEIR LIMITED REVENUE RAISING POWERS FROM THE STATE. MANY CITY GOVERNMENTS RELY PRIMARILY ON THE REGRESSIVE PROPERTY TAX WHICH MAY BE EVEN FURTHER LIMITED BY A STATE-WIDE CAP. THE COSTS OF SECTION 1983 INCLUDE THE COSTS OF

JUDGMENTS, SETTLEMENTS, AND LEGAL FEES FOR THE CITY. IN ADDITION, UNDER THE CIVIL RIGHTS ATTORNEY'S FEES AWARD ACT OF 1976 (42 U.S.C. §1988), THE CITY MAY BE REQUIRED TO PAY ATTORNEYS' FEES TO THE PREVAILING PARTIES IN SECTION 1983 SUITS. THESE FEES MUST SOMETIMES BE PAID BY THE DEFENDANT MUNICIPALITY IN THOSE CASES WHERE THE PLAINTIFF PREVAILS THROUGH A SETTLEMENT AGREEMENT OR CONSENT DECREE.

WE BELIEVE THAT CONGRESS SHOULD CLARIFY AND LIMIT SECTION 1983 SO THAT CITIES WILL NO LONGER BE FORCED TO SPEND THEIR LIMITED RESOURCES DEFENDING AGAINST FRIVOLOUS SECTION 1983 CLAIMS. THIS IMPORTANT PUBLIC POLICY GOAL CAN BE REACHED BY LIMITING SECTION 1983 TO THE REDRESS OF VIOLATIONS OF BASIC CONSTITUTIONAL AND CIVIL RIGHTS.

III. NLC RECOMMENDATIONS FOR AMENDMENTS TO SECTION 1983

THE COMMITTEE SHOULD BE GUIDED BY THE FOUR PUBLIC POLICY CONSIDERATIONS THAT I HAVE JUST OUTLINED. THE COMMITTEE HAS THREE BILLS (S. 584, S. 585, AND S. 990) BEFORE IT, EACH OF WHICH INCLUDES IMPORTANT FIRST STEPS TOWARDS BRINGING CERTAINTY AND PREDICTABILITY TO SECTION 1983. WE WOULD LIKE TO MAKE SOME RECOMMENDATIONS FOR AMENDING SECTION 1983 IN A MANNER WHICH BALANCES CIVIL RIGHTS SAFEGUARDS AND PROTECTIONS FOR MUNICIPAL GOVERNMENTS AND OFFICIALS (SEE ATTACHMENT). TO ACHIEVE THIS GOAL, CONGRESS MUST EXPLICITLY RECOGNIZE THAT SECTION 1983 SHOULD SERVE PRIMARILY TO DETER ILLEGAL CONDUCT AND CORRECT PAST ABUSES. IMPLICIT IN SUCH A POLICY DETERMINATION IS A DOWNGRADING OF THE IMPORTANCE OF COMPENSATING VICTIMS. WE BELIEVE COMPENSATION SHOULD STILL BE PERMITTED IN SOME CIRCUMSTANCES, BUT THAT IT MUST BE LIMITED TO ENSURE THAT SECTION 1983'S PRIMARY OBJECTIVES ARE DETERRING FUTURE ILLEGAL CONDUCT AND CORRECTING PAST ILLEGAL PRACTICES.

A. PROTECTIONS FOR MUNICIPAL OFFICIALS AND EMPLOYEES

NLC'S DRAFT STATUTE CONTAINS TWO PROVISIONS THAT WE BELIEVE ARE ESSENTIAL TO ENSURE THE CAPACITY OF CITY OFFICIALS AND EMPLOYEES TO FULFILL THEIR GOVERNMENTAL DUTIES.

FIRST, THE TRADITIONAL COMMON LAW AND STATUTORY IMMUNITIES (E.G., THE LEGISLATIVE IMMUNITY AND THE QUALIFIED EXECUTIVE IMMUNITY) SHOULD BE EXPLICITLY EXTENDED TO MUNICIPAL OFFICIALS AND EMPLOYEES UNDER SECTION 1983 (SEE PARAGRAPH (D) OF DRAFT STATUTE). WE SEE NO REASON FOR ALLOWING THE DEVELOPMENT OF ANOMALIES IN THE LAW, SUCH AS RESULTED FROM THE SCHEUER DECISION. SIMILARLY, WE BELIEVE MUNICIPAL OFFICIALS, WHEN ACTING IN A LEGISLATIVE CAPACITY, SHOULD RECEIVE THE SAME IMMUNITIES THAT STATE LEGISLATORS HAVE.

SECOND, THE LIMITS ON VICARIOUS LIABILITY OF SUPERVISORY OFFICIALS FOR THE UNCONSTITUTIONAL CONDUCT OF SUBORDINATES SHOULD BE DEFINED. WE BELIEVE LIABILITY SHOULD BE IMPOSED ON THE ACTUAL WRONGDOER IN MOST CASES. WE SUGGEST THE INCLUSION OF A PROVISION MAKING SUPERVISORS VICARIOUSLY LIABLE ONLY WHEN THEY HAVE THE KNOWLEDGE AND CAPACITY TO STOP THE ILLEGAL CONDUCT OF A SUBORDINATE (SEE PARAGRAPH (D) OF DRAFT STATUTE). SUCH A PROVISION WOULD ENSURE THAT LIABILITY IS ONLY IMPUTED TO A SUPERVISOR WHEN HE CLEARLY HAD A ROLE IN THE WRONGFUL CONDUCT.

B. PROTECTIONS FOR MUNICIPAL GOVERNMENTS

MONETARY DAMAGES SHOULD BE AVAILABLE FROM MUNICIPAL GOVERNMENTS UNDER SECTION 1983 ONLY WHEN OFFICIAL POLICY IS UNCONSTITUTIONAL AND IS NOT IMPLEMENTED IN GOOD FAITH (SEE PARAGRAPH (C)(1)). WE BELIEVE THAT CIRCUMSCRIBING THE AVAILABLITY OF MONETARY RELIEF WILL REDUCE THE NUMBER OF FRIVOLOUS SUITS AGAINST MUNICIPAL GOVERNMENTS. SUCH A CHANGE WOULD RECOGNIZE THAT COMPENSATION TO VICTIMS FOR PAST ILLEGAL CONDUCT MUST BE LIMITED TO PREVENT THE DILUTION OF THE DETERRENCE ROLE (WHICH I WILL DISCUSS SHORTLY) OF SECTION 1983.

IN ADDITION TO OVERRULING THE MAINE AND OWEN HOLDINGS AS THEY APPLY TO MONETARY RELIEF, WE ALSO RECOMMEND THAT SECTION 1983 SHOULD INCLUDE STANDARDS (SOMEWHAT SIMILAR TO THOSE PROVIDED IN S. 990) DEFINING THE EXTENT OF GOVERNMENTAL INVOLVEMENT NECESSARY

TO TRIGGER GOVERNMENTAL LIABILITY FOR OFFICIAL POLICY OR PRACTICES (SEE PARAGRAPH (C)(1) OF DRAFT STATUTE). THE STANDARDS--SUCH AS REQUIRING ACTIVE SUPERVISORY INVOLVEMENT OR THE FAILURE OF A SUPERVISOR TO PREVENT THE RECURRENCE OF UNCONSTITUTIONAL CONDUCT--ARE ESSENTIAL TO ENSURE THAT THE COURTS DO NOT DEFINE OFFICIAL POLICY OR PRACTICES TOO BROADLY.

MUNICIPAL GOVERNMENTS SHOULD BE EXTENDED THE GOOD FAITH DEFENSE IN ACTIONS FOR MONETARY RELIEF, BUT THEY SHOULD NOT RECEIVE GREATER PROTECTIONS FROM THE GOOD FAITH DEFENSE THAN INDIVIDUAL CITY OFFICIALS AND EMPLOYEES DO. HISTORICALLY, THE GOOD FAITH DEFENSE HAS NOT BEEN AVAILABLE TO INDIVIDUALS IN EQUITABLE ACTIONS. S. 585, WHICH PROVIDES THE GOOD FAITH DEFENSE TO MUNICIPAL GOVERNMENTS IN ALL ACTIONS, SHOULD BE MODIFIED TO RECOGNIZE THIS DISTINCTION.

THE FULL BURDEN OF DEFENDING AGAINST SECTION 1983 ACTIONS FOR EQUITABLE RELIEF SHOULD NOT FALL ON MUNICIPAL OFFICIALS. EVEN BEFORE THE RECENT COURT EXPANSION OF SECTION 1983, THE VICTIM OF A SECTION 1983 VIOLATION COULD OBTAIN PROSPECTIVE RELIEF THROUGH A DECLARATORY JUDGMENT OR AN INJUNCTION AGAINST THE INDIVIDUAL OFFICIAL OR EMPLOYEE RESPONSIBLE FOR IMPLEMENTING THE POLICY IN QUESTION, REGARDLESS OF HIS GOOD FAITH. THERE ARE UNDOUBTEDLY SITUATIONS WHERE THE GOVERNMENT IS THE APPROPRIATE DEFENDANT, RATHER THAN A PARTICULAR OFFICIAL. IN THOSE CASES, THE PLAINTIFF SHOULD BE ABLE TO GET AN INJUNCTION OR DECLARATORY JUDGMENT AGAINST THE GOVERNMENT. MANY CITY OFFICIALS BELIEVE THAT WHEN THEY ARE ACTING SOLELY ON BEHALF OF THE GOVERNMENT, THE GOVERNMENT SHOULD HAVE PRIMARY RESPONSIBILITY FOR DEFENDING ITSELF.

C. PROTECTIONS FOR CIVIL AND CONSTITUTIONAL RIGHTS

SECTION 1983 CAN TRULY SERVE TO PROTECT CIVIL AND CONSTITUTIONAL RIGHTS IF ITS PRIMARY PURPOSE IS TO GUARANTEE EQUITABLE RELIEF, SUCH AS INJUNCTIVE OR DECLARATORY RELIEF. IN OUR PROPOSAL (SEE PARAGRAPH (C)(2) OF DRAFT STATUTE), WE RECOMMEND THAT EQUITABLE RELIEF, ASSUMED TO MEAN PROSPECTIVE RELIEF, REMAIN

AVAILABLE WHENEVER OFFICIALLY SANCTIONED POLICY VIOLATES A CONSTITUTIONAL RIGHT OR FEDERAL STATUTE. SINCE THE EQUITABLE RELIEF CONTEMPLATED IS ESSENTIALLY PROSPECTIVE IN NATURE, GOVERNMENTS WILL ONLY HAVE TO INCUR THE COSTS OF BRINGING THEIR PRACTICES AND PROCEDURES INTO COMPLIANCE WITH THE LAW. WE CONSIDER SUCH POTENTIAL COSTS TO BE REASONABLE, ESPECIALLY WHEN WEIGHED AGAINST THE SOCIETAL COSTS OF PERMITTING WRONGFUL GOVERNMENTAL PRACTICES TO CONTINUE.

IV. CONCLUSION

WE HOPE THE COMMITTEE WILL GIVE SERIOUS CONSIDERATION TO OUR THREE MAJOR RECOMMENDATIONS: (1) PROVIDING GREATER PROTECTIONS FOR MUNICIPAL OFFICIALS AND EMPLOYEES; (2) PROTECTING MUNICIPAL GOVERNMENTS FROM UNLIMITED MONETARY LIABILITY; AND (3) ENSURING THE PROTECTION OF CIVIL AND CONSTITUTIONAL RIGHTS THROUGH BROAD ACCESS TO EQUITABLE REMEDIES. AT THIS TIME, WE BELIEVE THAT THESE CHANGES IN SECTION 1983 WILL OBVIATE THE NEED FOR CHANGES IN SECTION 1988 (IN OUR VIEW, THE PAYMENT OF THE LEGAL COSTS OF PREVAILING PARTIES WILL BECOME LESS OF A PROBLEM AS THE TIGHTER REQUIREMENTS OF SECTION 1983 REDUCE THE NUMBER OF FRIVOLOUS SUITS).

WE COMMEND THE COMMITTEE FOR TAKING UP THESE COMPLEX ISSUES. IN CLOSING, WE BELIEVE THAT CONSENSUS CAN BE ACHIEVED ON THE MAJOR POINTS THAT AMENDMENTS TO SECTION 1983 SHOULD ADDRESS. WE BELIEVE THAT SECTION 1983 CAN BE AMENDED SO THAT CIVIL RIGHTS SAFEGUARDS ARE ENHANCED BY MAKING CLEAR THAT ITS PURPOSE SHOULD BE THE DETERENCE OF ILLEGAL CONDUCT AND THE CORRECTION OF PAST ABUSES. TO ENSURE THAT THIS GOAL IS ACHIEVED, ACCESS TO MONETARY RELIEF MUST BE CLEARLY CIRCUMSCRIBED, REDUCING THE NUMBER OF FRIVOLOUS SUITS. CITY OFFICIALS WILL BE RELIEVED OF UNNECESSARY COSTS AND THE LAW WILL BE RESTORED TO ITS ORIGINAL PURPOSE: THE PROTECTION OF FUNDAMENTAL CONSTITUTIONAL RIGHTS.

Section-by-Section analysis of the Civil Rights Improvement Act of 1981

(a) Restatement of existing law (42 U.S.C. §1983).

(b) (New Section) Definitions

The entities subject to §1983 liability include local governments. That liability has been extended to local governments as a result of the Supreme Court's *Monell v. Department of Social Services* decision.

(c) (New Section) Liability of governmental entities

Governmental entities can be liable for monetary damages or subject to equitable actions. Liability for monetary damages is carefully circumscribed to enable governmental units to take preventive steps and to provide a predictable framework of liability. Equitable relief remains unrestricted in recognition of the need for strong civil rights protections.

(1) Monetary relief

Monetary relief is available from a governmental unit when official policy violates a constitutional right or federal law enacted to protect a constitutional right (i.e., monetary relief under §1983 would not be available for violations of federal statutes which do not protect a constitutional right, partially overturning the Supreme Court's 1980 holding in *Maine v. Thiboutot*).

The good faith defense is made available in actions for monetary damages, partially overruling the Supreme Court's 1980 *Owen v. City of Independence, Missouri*. However, it is not made available in equitable actions.

Governmental liability for §1983 violations of officers and employees is limited to unconstitutional conduct required by a supervisory officer or the failure of a supervisory officer to oversee an employee who has a history of unconstitutional conduct. (A).

(2) Equitable actions

The remedy in equitable actions will remain intact in recognition of the need to provide an unrestricted civil rights remedy. The good faith defense cannot be invoked, retaining traditional equitable concepts. A plaintiff can bring a suit in equity to challenge state and local practices which violate any federal statute, retaining the *Maine v. Thiboutot* holding.

(d) (New Section) Immunities for individuals

To establish certainty in the law, this subsection clearly states that the individual retains his traditional immunities in suits for monetary relief. It also defines and limits the liability of supervisory officers for the unconstitutional conduct of subordinates to those cases in which the supervisor had the knowledge and capacity to stop the unconstitutional conduct.

CIVIL RIGHTS IMPROVEMENT ACT OF 1981

(a) Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or caused to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(b) For purposes of this section, 'person' means any natural person, association or combination of natural persons, partnership, corporation, or other legal entity, or municipality or unit of government; 'municipality or unit of government' means county, parish, or local governmental subdivision, unit or agency, or the District of Columbia or agency thereof; 'official policy' means policy authorized or required by a statute, ordinance, regulation, rule, or practice of the municipality or unit of government; 'supervisory officer' means a person with the authority of the municipality or unit of government to make or implement official policy.

(c) A municipality or unit of government may be liable under this section when --

(1) for purposes of damages or other monetary relief, official policy of the municipality or unit of government violates the rights, privileges, or immunities secured by the Constitution and laws implementing the Constitution and is not made or implemented in good faith.

(A) the municipality or unit of government shall not be liable under paragraph (c)(1) for conduct actionable under paragraph (a) of this section of an officer, employee, agent or other person acting under its authority unless:

(i) a supervisory officer assisted in or directed the conduct or failed to end or prevent the recurrence of that conduct and had the knowledge of and authority to end or prevent the recurrence of the conduct.

(B) the municipality or unit of government shall not be liable under paragraph (c)(1) for any other conduct actionable under paragraph (a) of this section of an officer, employee, agent or other person acting under its authority.

(2) for purposes of injunctive or declaratory relief, official policy of the municipality or unit of government violates the rights, privileges, or immunities secured by the Constitution and laws.

(d) An officer, employee, agent or other person acting under the authority of the municipality or unit of government is entitled to common law and statutory immunities in an action for damages or other monetary relief. These immunities shall include (but are not limited to) legislative, prosecutorial, judicial and good faith immunities. No supervisory officer shall be liable in an action for damages or other monetary relief for the conduct of a subordinate officer, employee, or agent under paragraph (a) of this section unless he had actual knowledge of and the authority to end or prevent such conduct of the subordinate.

Senator DECONCINI. Our last witness will be Mr. Charles Stephen Ralston of the NAACP legal defense fund.

Mr. Ralston, we welcome you here. Any formal statement you have we will include in the record. Please summarize for us.

STATEMENT OF CHARLES STEPHEN RALSTON, NAACP LEGAL DEFENSE FUND

Mr. RALSTON. Thank you, Senator DeConcini.

I have provided a written statement for the record. I would like to thank the committee for the opportunity to appear and testify regarding Senate bills 584 and 585.

THE LEGAL DEFENSE FUND OPPOSES ANY WEAKENING OF 1983 OR 1988

The NAACP Legal Defense Fund is opposed to the bills and are in favor of S. 990, the bill to broaden the scope of 1983. We are particularly opposed to any attempts to cut back on the ability of civil rights litigants to obtain counsel fees in these important cases.

In my prepared statement, I have addressed briefly the bills themselves. Essentially, we concur with the views of the NAACP—a separate organization from the Legal Defense Fund—and the National Legal Aid and Defenders Association, which has provided a very fine statement of the reasons why the bills should not be passed.

I am going to spend most of my time talking about attorneys' fees, and I would also like to address some of the comments and remarks made today by some of the earlier witnesses. It will not be any surprise to the committee that I come to these issues with a much different perspective than they do, being on the plaintiffs' side of these cases. We have, in fact, litigated many cases in the State of North Carolina, one of those represented by the Attorney Generals' group.

Quite frankly, the picture drawn of poor, beleaguered State and local officials is one that I do not see from my perspective. There have been a lot of anecdotes this morning of particular cases that they, as defense counsel, believe are frivolous. There are, of course, frivolous cases brought under 1983, just as there are frivolous cases brought under all statutes and pursuant to all causes of action.

However, we do not think the cases we bring are frivolous and we do not think most of the cases brought under these statutes are frivolous. Let me give some examples of my own, cases that have also involved attorneys' fees.

A case in Texas against a small Texas school district, *Harkless* v. *Sweeney Independent School District* went on for 13 years in an attempt to return black teachers to their jobs after they had been dismissed in violation of their constitutional rights. It was fought at every point of the way by the local officials. It required two appeals to the court of appeals and an attempted appeal to the Supreme Court. Finally the courts held that the constitutional rights of the plaintiffs had been violated. Unfortunately, some of them had died in the meantime and they never knew that their rights had been vindicated nor did they receive the benefits of the back pay award.

We received counsel fees in that case. It was a substantial amount, about $300,000 for 13 years of litigation, years and thousands of hours of lawyer time. That fee was a financial burden on the locality, and we arranged for it to be paid over a period of years so it will not be too much of a burden.

THE LITIGATION TACTICS OF GOVERNMENT ATTORNEYS

I have given the *Harkless* case as an example because I too am bothered by the amount of fees that are paid out by State, local, and Federal agencies in attorneys' fees; but what bothers me is the extent to which these amounts are often caused by the litigation tactics of lawyers representing Government clients.

Unfortunately, unlike many private attorneys representing private clients, there does not often seem to be much incentive for Government attorneys to settle cases that should be settled, or to litigate them on a reasonable basis. It has been our experience in litigation against government entities, and it is perhaps worse with Federal agencies in actions under title VII of the Civil Rights Act, that these cases are litigated to the hilt.

We had a major case in the State of Georgia against the Georgia State Prison. The case went on for 7 years and took 20 weeks of trial. After the trial was over, because of encouragement from the judge, because of incidents at the prison, and after some different attorneys became involved, the State of Georgia agreed to settle the case basically on the same terms that we had presented to them before the last 6 months' worth of trial. The State of Georgia eventually agreed to pay $650,000 in attorneys' fees and costs. Much of that could have been saved if the State had settled on what we felt were reasonable terms, since the terms of the settlement were largely that the prison officials would obey and conform to their own regulations governing the running of the prison.

Senator DECONCINI. Mr. Ralston, in such a case as that, how were the attorneys' fees determined?

Mr. RALSTON. Senator, we presented a very detailed statement of the hours of work performed. It was a huge stack of papers.

Senator DECONCINI. Was this only the Legal Defense Fund?

Mr. RALSTON. There were also four attorneys in private practice from small firms, and single practitioners, which is another perspective that has to be brought to civil rights litigation mentioned in my statement. The private attorneys were from a firm of four lawyers, from one of two lawyers, and one was a single practitioner. They did not get a nickel in fees during the 7 years this case went on and on and on. Therefore, the Legal Defense Fund had to bear much of the burden because of that.

It is virtually impossible for an attorney in a small practice, and most civil rights cases are handled by attorneys who are in small firms to handle cases of this complexity all by themselves.

Senator DECONCINI. Was the $650,000 the amount you submitted?

Mr. RALSTON. We submitted more than that. Our base amount of fees was close to $700,000, and we asked for a multiplier. We negotiated a settlement for somewhat less than what we had asked for.

Senator DECONCINI. Did the court just approve the settlement?

Mr. RALSTON. The court issued an opinion in which it detailed the reasons why it felt the settlement was proper.

Senator DECONCINI. They did not get involved in the settlement of the attorneys' fees?

Mr. RALSTON. The court encouraged us to settle.

Senator DECONCINI. On the fees, you mean?

Mr. RALSTON. On the fees. It wrote an opinion approving it. Since it was a class action, the court had the responsibility of doing so.

Senator DECONCINI. I was just interested in how it actually worked.

Mr. RALSTON. As a matter of fact, we met with the court and we talked about where we were. The court encouraged us to reach an agreement, which we did. All the lawyers involved on the plaintiff's side spent over 7,000 hours of time in that case, and the State did not really contest the number of hours since they knew how long that case had taken.

We have a case against a Federal Government agency in California in which on the Friday before the Monday trial was to start, the Government decided to settle the case. Needless to say, a lot of attorney time had been spent preparing for that trial.

We then spent a year trying to negotiate the counsel fees after the merits had been settled. The Government finally presented us a final offer which we thought was unreasonable and we went to the judge. Our expectation is that the judge will grant fees in a substantially greater amount than we would have been willing to settle for if the Government had taken a reasonable position.

The *Copeland* case, which was mentioned by one of the attorney general witnesses, is another case in which the Government litigated right up to the very eve of trial, finally settled it, and then complained about the attorneys' fees. The court of appeals pointed out that while of course the Government has a right to litigate any way it wants to, it cannot then complain if its litigation strategy results in the multiplication of fees and time. By the way, there was not a multiplier asked or given in that case, contrary to the earlier testimony.

COUNSEL FEES SHOULD NOT BE AWARDED AGAINST CIVIL RIGHTS PLAINTIFFS

Senator DECONCINI. I think it is proper to have attorneys' fees in the law. My only question is whether or not it ought to be available to the complainant when they do not succeed. It seems to me that when you succeed and you force the Government or any entity, as you have and as you point out in your statement, then indeed attorneys' fees are proper and part of the whole thrust of the Civil Rights Act.

However, what about the other side of the coin? What if you bring a suit and you do not succeed? In fact, I suspect you probably have. I do not know too many good lawyers who have not lost a case now and then. Is it not fair to have the attorneys' fees awarded against the complainant?

Mr. RALSTON. I do not think so in these types of cases, Senator. Let me explain why.

The typical civil rights plaintiff in an individual case against the Federal Government, maybe a GS-5 or a GS-6 or GS-7 employee who is trying to obtain a promotion that he believes he has been denied, is up against first the cost of litigation. He is up against the U.S. Attorney's Office, agency counsel, and vast resources. He will not, in most cases, have the money to retain counsel for themselves. There are all sorts of hindrances already, given the imbalance of resources typically in these cases, that inhibit bringing any lawsuit.

In most cases, if the plaintiff loses, he can be assessed costs, which are separate from attorneys' fees and are routinely assessed in favor of prevailing defendants. That in itself is a disincentive. I think, in short, you have to look at who the plaintiffs typically are as against who the defendants are.

Senator DECONCINI. I agree with that. I suspect courts do it. Maybe you have answered my question. Maybe it is because of who the complainants are that they do not generally award attorneys' fees.

However, it seems to me some encouragement for them to award some attorneys' fees. Obviously a GS-5 would not have the resources that the State of South Carolina might have, or the State of Arizona, and the State should not, in my opinion, be awarded for fees. However, if you do lose the case, it seems to me proper for the citizen who brings it to have the availability of bringing a case and have a lawyer tell him his chances are not very good and there are some liabilities involved if the case is lost. Or tell him the other way, that there is a good chance on this.

Mr. RALSTON. Senator, just coming again from the perspective of a plaintiff's lawyer advising people, and also the perspective of my wife who happens to be in private practice handling almost exclusively civil rights cases, we tell a lot of clients that the chances are not that good, that there are problems in the long haul against a government agency. If the Legal Defense Fund takes a case, we bear the plaintiffs' costs, so that is not a problem. But, we do screen our cases. We bring mostly class actions, which no one could afford to bring at all if they do not have our support.

In my wife's practice, she advises individual clients that they are going to have to bear the costs. There is a problem of getting an attorney to do it at all. There is a disincentive for an attorney to take one of these cases if the attorney, in his or her assessment, sees that the case is probably a loser because the typical client cannot pay anything. An attorney is not going to take a case when she is likely to wind up 5 years down the road with zero in her pocket.

In short, the attorneys that I know who take these cases try to assess cases carefully and take those they believe can be won because that is the only way they are going to be paid. They do not have clients who have a lot of money and can hire a lawyer to do whatever they want to do.

In our statement, we have quoted what the Supreme Court had to say on this issue in *Newman* v. *Piggie Park Enterprises.* It points out that the nature of civil rights cases is such that that kind of financial burden would inhibit the bringing of these lawsuits.

GOVERNMENT AGENCIES HAVE MUCH GREATER RESOURCES THAN PLAINTIFFS

Again, in terms of the relative resources of plaintiffs and defendants, we have responded to the statement by the National Institute of Municipal and Local Officers [NIMLO] in which they allege that civil rights organizations such as ours, typically direct test cases against small local government agencies. I think that is also the impression left by the testimony by some of the witnesses today.

However, I do not think that is generally true. To give you an idea of how small the Government agencies we litigate against are, they include the U.S. Army, Navy, Air Force, and Marine Corps, NASA, the Department of Commerce, and the Tennessee Valley Authority. We are also suing the cities of New York, New Orleans, and Mobile, Ala; and involved in litigation against private companies such as the United States Steel Corp., Gulf Oil, Dupont, and General Motors.

There is a tremendous imbalance of resources. We have 22 lawyers total. The amount of our budget that is allocated to litigation is under $4 million.

Senator DECONCINI. How much did you collect in attorneys' fees?

Mr. RALSTON. Last year we made a concerted effort to increase our collection of attorneys' fees and we received $1.5 million of our total budget of $5 million in attorneys' fees and costs. We are hoping to stabilize that at about $1 million a year or at about 20 percent of our budget. Before we were able to do that, we had suffered 7 years worth of deficits. We were faced with cutting back staff.

Senator DeConcini. You do not pre-plan what you are going to collect in attorneys' fees, do you?

Mr. Ralston. It is very difficult, but we can estimate.

Senator DeConcini. You cannot really budget that because you have no idea of what your suits are going to be; can you?

Mr. Ralston. We can generally get an idea of what we are likely to get. The problem is you never know when you are going to get it, since it depends on when a judge is going to decide it and if the other side appeals. We have outstanding now about $2.5 million in attorneys' fees applications. Some of them have been pending more than a year just in the district court.

It has been our experience that with Government agencies as opposed to private employers, if there is a big fee award, those get appealled, even in cases where the chance of getting a reversal are not that great. In Federal Government cases, you do not get paid anything until the appeal is all over because the Comptroller General will not issue a check even as to those amounts that are not in contest by either party on appeal.

We have some resources to help us struggle through while we are waiting for that money, but for the typical attorney representing the typical civil rights plaintiff, there are not those resources there.

Senator DeConcini. Mr. Ralston, I am sorry, but I am going to have to leave. I am 20 minutes late for an appointment, but the staff will stay here and take the rest of your testimony. I hope you will feel comfortable in giving it. Also, I have some questions that I would like to submit to you, but I would like to give them to you in writing.

Mr. Ralston. I would be happy to respond.

Senator DeConcini. Please continue.

Mr. Ralston. Thank you.

THE NEED FOR CIVIL RIGHTS LITIGATION

I would just like again to put into the record some of the kinds of cases that are involved in civil rights litigation. Again, we have heard anecdotes about cases that seem frivolous, but, our experience is otherwise. For example, the Supreme Court held in 1880 that it was illegal to exclude blacks from juries. We still, 101 years later, have to bring lawsuits against local officials who are excluding blacks and women from juries. In these cases, you typically hear, "Well, we just did not have any idea that this violated the Constitution of the United States." It does, and it is, about time some local officials learn what the Constitution and laws of the United States require.

There has been testimony about whether or not the threat of lawsuits under the civil rights acts may affect the way decisions are made. I see nothing wrong in affecting the judgment processes of State and local government officials if it makes them start thinking about what the Constitution requires, what the laws of the United States require, and that they are just not free to do anything they want regardless of the rights of the citizens of the United States.

There are problems out there; people's rights are being denied. There are not effective remedies in many State courts. Only a fully expanded section 1983, with the ability to obtain counsel fees after the litigation is successfully completed, will there be an incentive for some Government officials to obey the law.

One has to keep in mind that fees are generally not assessed in these cases unless there has been a determination by the court that the Constitution or laws of the United States have been violated. If State and local government officials want to avoid paying counsel fees or damages, the easy way is not to violate people's rights.

In some instances, of course, there are hard questions about how laws are to be interpreted. However, there are a lot of cases where it should have been perfectly obvious to State and local governments that what they were doing was illegal. It is through 1983 and the availability of counsel fees that there is an effective way to deal with those types of illegal actions.

There may be fiscal problems for some local governments, but quite frankly, they are nothing like the problems presented to the typical plaintiff in civil rights cases in attempting to vindicate their rights.

During the testimony of the attorneys general, there were some statistics given as to the number of 1983 cases. I think those statistics have to be looked at very carefully. A large proportion of those cases tend to be per se prisoner cases which are disposed of rather rapidly. Again, there are cases filed under this statute as under other statutes in every court in the country, that probably should not be filed.

However, to restrict the scope of 1983 and to restrict the ability to obtain counsel fees in cases where people win and vindicate their rights is simply throwing the baby out with the bathwater. You have to have some play in the statute. You are not going to have any statute under which every lawsuit brought is a perfect lawsuit. Overall, 1983 and 1988 allow the vindication constitutional and other Federal statutory rights and this far outweighs any drain it puts on either the court system or on State and local government.

COMMENTS ON THE TESTIMONY OF EARLIER WITNESSES

I would like to very briefly give my comments on some of the questions that were asked to the extent that I have not already. That will complete my testimony.

The question was asked what the impact of 1983 was in view of the Reagan administration's thrust of returning power to the States. My view—again from the perspective of someone who has spent all his professional career litigating many cases against State and local governments which have been violating people's rights--is that if more power is going to be sent back to the States, it is even more imperative that section 1983 and 1988 remain strong and indeed be strengthened. There very well may be more problems that need addressing by the Federal courts and there is no other forum to assure that people's constitutional and statutory rights are protected.

With regard to the problem of an imbalance between what State and local government officials may be subject to and what Federal officials may be subject to, we would certainly be in full support of any proposal to cut back on the scope of Federal sovereign immunity.

For example, the 1988 act was interpreted to not allow fees against the Federal Government. We have supported legislation to allow fees against the Federal Government. Indeed, as far as we are concerned, the sovereign immunity of the Federal Government might well be abolished altogether because of some very serious obstacles it places in the vindication of people's rights.

Finally, as to the issue of personal liability of State and local government officials, there are a variety of both absolute and qualified immunities that protect many officials from any sort of personal liability. In the perspective that we have of, for example, police officers shooting and killing people in violation of their rights, prison guards beating people in violation of their rights, they should fear the assessment of damages because that may be the only thing that will be a disincentive to taking those types of actions.

With regard to liability insurance, I am not sure what the situation is in Arizona, but I do know that in some of our cases liability insurance has covered compensatory damages that were awarded. This has been helpful because one of the problems with recovery being restricted to individual liability, as the proposed bills would do, is that individual government employees or officials generally do not have a whole lot of money. For example, one of our cases involved five prison guards who beat a prisoner for no reason at all. It was very difficult to recover money damages from them because they, like many such public employees, receive very low salaries and simply do not have the assets to meet a substantial judgment.

That brings me to the conclusion of my remarks. Again, I would be happy to respond to any questions either orally or in writing.

SECTIONS 1983 AND 1988 SHOULD NOT BE AMENDED EXCEPT TO STRENGTHEN THEM

Mr. ORMSBY. Thank you, Mr. Ralston. We appreciate your testimony. Senator Hatch did have a number of questions he would like to ask you. I think we will submit most of those in writing. However, if I could, I might ask one or two of them.

First, do you feel that attorneys' fees should be awarded for violation of any Federal law regardless of whether it pertains to civil rights? If so, do you feel that Congress intended this when it passed the Civil Rights Attorneys' Fees Award Act of 1976?

Mr. RALSTON. Obviously by its title the 1976 act was directed mostly at civil rights, but there is, as I recollect the legislative history, some indication that it was intended to have a broader scope.

The problem with restricting the statute as has been proposed is it cuts too broadly. There are all sorts of claims, such as ones arising under the Social Security Act where people's welfare benefits have been taken away wrongfully where people should be able to recover the costs of litigation.

If there are certain categories of cases, for example anti-pollution statutes involved in the recent Supreme Court case testified to earlier, that Congress feels should not come under 1983 at all, then I would suggest that Congress address those specific statutes and make a considered judgment as to whether it does or does not want them covered by 1983, rather than just make a blanket exclusion which would cut out many statutes that should be included.

Mr. ORMSBY. Witnesses representing local governments before this subcommittee have testified that because of attorneys' fees incentives more and more dollars had to be diverted from important services to the legal departments in order to defend against section 1983 cases, many of which the Government unit ultimately wins. Do you have any concern that too much litigation, particularly on non-civil rights claims, will result in important services being terminated for those who need it most, namely poor people, many of whom are minorities?

Mr. RALSTON. My first reaction to that is that poor people, and again I do not have any statistics and this is an impression, have obtained many more rights and benefits through litigation of this sort than they have lost to date because baseless cases have been brought.

What percentage of cases brought under 1983 are won or lost and what the resources are that have been diverted to them, I really cannot say. Again, I would like to reiterate that one of the reasons that there may be an undue drain on local or State resources is the litigation strategies adopted by the attorneys who are defending these cases. Many go much further than they should before they are settled, and many counsel fees applications themselves are litigated far beyond what they should be rather than being settled on a reasonable basis. I would suggest to the distinguished group of attorneys general that testified earlier, that a lot of public money could be saved by a review and strict supervision of the litigation tactics of the line attorneys representing public agencies.

Mr. ORMSBY. In your written statement, you state: "It was only because of a concerted effort to go after and recover fees that it did not have a deficit in 1980." Do you have any concern that lawyers and law firms which do not share your laudatory goals will view section 1988 as an income-generating statute and that this incentive will result in undue burdens on State and local governments?

Mr. RALSTON. Again, it has been my experience that there are very few people who are even coming close to getting rich from civil rights cases. If one looks, for example, at the level of the awards in these cases, it is nothing like what courts give out routinely in antitrust, securities, or bankruptcy cases, even though Congress said they were supposed to be of comparable amounts.

I know attorneys in small firms, medium firms, and big firms. In most instances, civil rights cases, if anything, tend to be a drain on their resources. One of the reasons for the multipliers that were complained about this morning is because if you have to wait 2, 3, or 4 years before you get any money back at all, you need something to make up for the delay and for the uncertainty of any payment.

Defendants' lawyers get paid whether they win or lose and on a regular basis. Plaintiffs' lawyers in these cases do not and they do not get rich. For these reasons, I do not see any move toward more people getting involved in these cases. To the contrary, the Legal

Defense Fund has a hard time finding attorneys willing to take on the burden they entail. In the District of Columbia, for example, lawyers are leaving civil rights practice because of the difficulty and uncertainty of obtaining fees.

Mr. ORMSBY. Do you have any recommendations on modifying section 1988 to reduce its burden while still maintaining its important original goal? I guess the idea behind that is if it was viewed as being overly burdensome, are there any recommendations that you would make to modify 1988 but still leave intact its original purpose?

Mr. RALSTON. I really do not see any problem. I think the courts are applying 1988 as it was intended to be applied by Congress when it passed it in 1976. I think the objectives and goals that Congress set out in 1976 were correct. I do not see any need to amend it except to clarify it so that it applies to actions brought against the Federal Government. I would expand its scope.

Mr. ORMSBY. Does the NAACP Legal Defense Fund have a position on S. 990? If so, what is that position?

Mr. RALSTON. As I said earlier, we do support S. 990 as we have supported S. 35, its earlier version. Generally we think it would be a valuable amendment to and expansion of section 1983.

Mr. ORMSBY. Thank you very much, Mr. Ralston, for coming.

[The prepared statement of Mr. Ralston follows:]

PREPARED STATEMENT OF CHARLES STEPHEN RALSTON

Mr. Chairman and members of the Subcommittee.

My name is Charles Stephen Ralston, and I am here representing the NAACP Legal Defense and Educational Fund, Inc. I first wish to thank the Subcommittee for the opportunity to testify concerning S. 584 and S. 585.

The NAACP Legal Defense and Educational Fund, Inc., is an independent, tax-exempt, charitable organization established under the laws of the State of New York. Originally established by the National Association for the Advancement of Colored People in 1940, it has been a wholly separate organization for nearly 25 years. It has its own board of directors, staff, budget, and fund-raising operations.

The Legal Defense Fund's main purpose is to provide legal representation to Blacks and other minorities, as well as to other persons in appropriate cases, in litigation to vindicate and enforce their civil and constitutional rights. In the more than 40 years of its existence, a large part of its cases has been brought under 42 U.S.C. § 1983 and its related statutes. These have included, among many others, Brown v. Board of Education, 347 U.S. 483 (1954). Fund lawyers were counsel for the petitioners in Monell v. Department of Social Service, 436 U.S. 658 (1978). Thus, the Legal Defense Fund has a direct interest in § 1983 remaining a viable and effective remedy for denials of federal rights of all sorts. It is this concern that leads us to oppose passage of both bills under consideration here.

Rather than repeat what has already been well said, we would like to associate ourselves completely with the remarks and position statements made to the Subcommittee by Althea T. L. Simmons of the NAACP and Steven H. Steinglass on behalf of the National Legal Aid and Defender Association (NLADA). We believe they set out clearly the overriding policy concern that militates against a cutting back or weakening of § 1983 - governments at all levels must be able to be held responsible for their actions. When they violate federal rights, whether constitutional or statutory, the aggrieved individual must have an effective judicial remedy. Otherwise the rights embodied in our Constitution and enacted in our statutes, will be hollow and meaningless. The presentation by NLADA demonstrates beyond a doubt that the claims that this type of litigation have resulted in crushing burdens on state and local governments are without foundation.

Today, I would like to address in detail a related issue much discussed in the presentations of those in favor of S. 584 and S. 585, the counsel fee provisions of § 1988. In particular, I will respond to contentions made by the National Institute of Municipal Law Officers (NIMLO). However non-partisan NIMLO may be politically, it is definitely not non-partisan with regard to the attorneys' fee issue - and neither is the Legal Defense Fund. Our experience, and the experience of other organizations like ours and of hundreds of attorneys in private practice, confirms the judgment made by Congress in 1976. The liberal availability of counsel fees is a prerequisite to the effective enforcement of the substantive rights guaranteed by the Constitution and laws of the United States. As the Supreme Court held in the seminal decision of Newman v. Piggie Pack Enterprises, 390 U.S. 400, 402:

> If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees - not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief ....

Newman, by the way, was a Legal Defense Fund case, as have been a number of the other leading cases dealing with fee recoveries in civil rights cases. E.g., Hutto v. Finney, 436 U.S. 678 (1978); Northcross v. Board of Education, 412 U.S. 427 (1973); Bradley v. School Board, 416 U.S. 696 (1974); Johnson v. Georgia

Highway Express, 488 F.2d 714 (5th Cir. 1974). Our long, in-depth involvement with the question makes us uniquely qualified to respond to assertions made by NIMLO.

The Legal Defense Fund's interest in attorneys' fees is neither abstract nor academic. Our litigation program depends on the cooperation of private attorneys, most of whom are in small firms or are single practioners. Without the hope of adequate fees, these attorneys would, by and large, be unable to handle a significant volume of civil rights cases. In the main, plaintiffs in these cases are unable to pay fees even in individual cases, let alone in major class actions. Although the Legal Defense Fund bears the costs of the litigation it takes on, it is unable to compensate its co-operating attorneys at more than a nominal level ($50 per day for in-office and $100 per day for out of office work).

Moreover, the Fund itself depends on fee recoveries for its own income. Over the period 1974-1979, the Fund suffered a series of deficits that seriously depleted its limited reserve fund. Early in 1980, it was, for the first time, forced to cut back on its staff; it had earlier put a freeze on taking on new litigation (with few exceptions). It was only because of a concerted effort to go after and recover fees that it did not have a deficit in 1980. Its recovery of $1.5 million in fees and costs allowed it to make up, however, only three years' worth of prior deficits. We hope, in the future, to stabilize fee and cost recoveries at 20% of our budget of $5,000,000 per year.

The NIMLO statement[1] conjures up the specter of civil rights organizations with vast resources singling out helpless small governmental agencies to litigate against. The facts are quite different. The Legal Defense Fund is perhaps the largest private public interest law organization in the country. Its total legal staff consists of 22 attorneys who work with attorneys who, as noted above, are typically in small firms or in single practice. The total corps of Legal Defense Fund co-operating attorneys, nationwide, numbers around 130-150. Of that number, however, many handle Fund cases only occasionally. The role of co-operating attorneys varies from case to case, ranging from fulfilling requirements that local counsel be on papers to that of lead counsel primarily responsible for conducting the litigations. Of the Fund's total budget of about $5,000,000, less than $4,000,000 is available for its legal program.[2] This limited staff and budget must support a nationwide litigation program of hundreds of cases.

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[1] Pages 25-27.

NIMLO's statement (p. 26-27) that organizations such as ours "typically" direct test cases "against small local governments" is simply not true. Three attorneys on the Legal Defense Fund staff, for example, are responsible, along with other duties, for litigation against such "small" agencies as the United States Army, Navy, Air Force, Marine Corps, NASA, Department of Commerce, Postal Service, Office of Personnel Management, the Tennessee Valley Authority, and the National Labor Relations Board. In the state and local government area, three to four other attorneys are handling cases against such "small local governments" as, for example, the cities of New York, New Orleans, Mobile, and the New York State Department of Corrections.[3] This same group of lawyers have been litigating against such "small" private companies as U.S. Steel Corporation, Republic Steel, International Paper Co., Gulf Oil, Georgia Power Co., Monsanto Corp., Phillip Morris

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2/ The Fund also administers scholarship and public information programs.

3/ This does not even include the Fund's capital punishment work, in which three to four attorneys, working with another group of lawyers in private practice, are arrayed against the staffs of the local district attorneys and state attorney generals' offices of more than half the states.

Corp., Pillsbury Co., and General Motors, to name but a few.

The picture sought to be drawn by NIMLO of huge organizations having vast resources, picking on small, helpless, local governments is nothing short of ludicrous. As Congress has repeatedly recognized the resources are overwhelmingly on the side of the defendants in civil rights cases, whether they be governmental agencies or private corporations. Both in terms of money and legal staff, they vastly outweigh all of the private organizations involved in public interest law put together.

Nor is it an answer that the federal government is involved in civil rights cases. In the vast majority of our cases, the United States is not involved. Indeed, in our Title VII litigation against federal agencies there is no public attorney general at all. Enforcement depends solely on private action.[4] Even where the United States may sue, limitations on its resources means that enforcement on a wide scale depends on the private bar. It was precisely in recognition of this fact that Congress has enacted the various attorneys' fees provisions. Without them, effective enforcement of the constitutional and statutory rights of hundreds of thousands, if not millions, of the most deprived and helpless part of the population of the United States would be crippled. Giving lip service to the importance of these rights is not enough. Without the means to enforce them they will become meaningless pronouncements.

Finally, I would like to address some of the specific proposals of NIMLO set out on pages 27 to 29 of their statement.

1. The courts already require that there be a causal connection between the bringing of an action and the result. See, e.g., Criterion Club of Albany v. Bd. of Commissioners, 594 F.2d 118 (5th Cir. 1979).

2. The argument that only time spent on issues "prevailed" upon is totally impracticable and unrealistic, and would seriously

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4/ See, Parker v. Califano, 561 F.2d 320, 331 (D.C. Cir. 1977).

undermine counsel's ability to give adequate representation. See, Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir. 1981). Time spent on frivolous or insubstantial claims is properly excluded. Ibid; Northcross v. Bd. of Education, 611 F.2d 624 (6th Cir. 1979).

3. Any pegging of fees to amounts recovered completely overlooks other benefits obtained through this type of litigation. See, e.g., Harkless v. Sweeney Independent School District, 608 F.2d 594, 598 (5th Cir. 1979). For example, in fair employment cases, plaintiffs will receive future monetary benefits as a result of promotions, etc., that may be much greater than back pay. Copeland v. Marshall, 641 F.2d 880, 906-07 (D.C. Cir. 1980).

4. Contrary to NIMLO, large multipliers are not routinely given. A multiplier is a reasonable and appropriate method of compensating for such factors as contingency, delays in payment, etc. Copeland v. Marshall, supra at 892-93.

5. Elimination of fees for litigating fee awards would have exactly the opposite result claimed. Plaintiffs' counsel have every interest in the speedy resolution of fee claims, particularly since in many class actions they have been without compensation for anywhere from two to ten years. It is the Fund's experience that it is defendants, and particularly government lawyers who have no pressure to settle on reasonable terms, who delay obstinately. The removal of the one countervailing consideration - that time spent in litigating fees must be paid for - will remove any incentive for the expeditious resolution of fee claims.

6. The Christiansburg standards are absolutely essential to the enforcement of civil rights. The purpose of the fee statutes is to encourage the bringing of litigation in the public interest. The prospect of bringing suit against a governmental agency is intimidating enough. The threat of a fee award if a case is lost would discourage all but the most foolhardy. Moreover, costs independent of fees can already be assessed. This can itself be a disincentive to suing.

7. Finally, the proposal that organizations not receive fees is based, as shown above, on a false premise. Limited in resources, these groups depend on fees for the continuation of their activities.

In conclusion, the Legal Defense Fund wishes to re-emphasize that this Subcommittee has a clear choice. If it wishes to ensure that the civil and constitutional rights of America's citizens will be enforced, it should leave the counsel fee statutes as they are. Any of the proposed changes or any other weakening of their provisions would only give governmental agencies again the overwhelming advantage in financial and legal resources they enjoyed for so long. State and local government agencies have an easy way to avoid paying attorneys' fees, i.e. not to violate the constitutional and statutory rights of Americans in the first place. After all, in the great majority of cases, fees have been assessed only after a determination that such violations have taken place.

Thank you very much for your attention, and I will be happy to answer any questions the Subcommittee might have.

Mr. ORMSBY. That concludes today's hearing.

[Whereupon, at 12:05 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

CORRESPONDENCE AND RESOLUTIONS

RESOLUTION #2

MUNICIPAL LIABILITY

WHEREAS, recent decisions of the federal courts have exposed municipal governments to liability for violations of constitutional rights and federal laws;

NOW, THEREFORE, BE IT RESOLVED that the National League of Cities will

1) Propose and support legislation extending the good faith immunity to municipal governments in Section 1983 suits; and

2) Propose and support legislation limiting the coverage of Section 1983 to violations of constitutional rights.

Approved by the Membership of the National League of Cities
• Annual Business Meeting • December 3, 1980 • Atlanta

EDMOND J. RUSS, *Mayor*
DONALD L. DEAR, *Mayor Pro Tem*
MAS FUKAI, *Councilmen*
CHARLES A. NADER, *Councilmen*
PAUL Y. TSUKAHARA, *Councilmen*

1700 West 162nd STREET | GARDENA, CALIFORNIA 90247 | (213) 327-0220

CITY of GARDENA

MAY Y. DOI, *City Clerk*
GEORGE KOBAYASHI, *City Treasurer*
JOHN C. SHEEHAN, *Administrative Officer*
MICHAEL H. MILLER, *City Attorney*

January 19, 1981

MEMORANDUM OF TRANSMITTAL

TO: See Distribution Sheet

DOCUMENT: Resolution No. 3671
Supporting Amendments to the Civil Rights
Act and Other Related Provisions to
Address the Recent Undue Exposure of
Municipalities and City Officials to
Liability.

Enclosed herewith is a copy of Resolution No. 3671 which was passed, approved and adopted by the Gardena City Council at a regular meeting held on January 13, 1981.

FROM: May Y. Doi, City Clerk
City of Gardena, California

/ijg

cc: City Attorney
Administrative Officer

DISTRIBUTION LIST

(Copy of Resolution No. 3671 transmitted January 19, 1981 to the following re Undue Exposure of Municipalities and City Officials to Liability.)

United States Congressman Mervin Dymally
2335 Rayburn Office Building
Washington, D. C. 20515

United States Senator S. I. Hayakawa
New Senate Office Building
Washington, D. C. 20510

National Institute of Municipal Law Officers
1000 Connecticut Avenue N. W., Suite 800
Washington, D. C. 20036

City of El Segundo
350 Main Street
El Segundo, Calif. 90245

City of Hermosa Beach
1315 Valley Drive
Hermosa Beach, Calif. 90254

City of Lawndale
14717 Burin Avenue
Lawndale, Calif. 90260

City of Manhattan Beach
1400 Highland Avenue
Manhattan Beach, Calif. 90266

City of Rancho Palos Verdes
30940 Hawthorne Boulevard
Palos Verdes, Calif. 90274

City of Rolling Hills
Two Portuguese Bend Road
Rolling Hills, Calif. 90274

City of Torrance
3031 Torrance Boulevard
Torrance, Calif. 90503

United States Senator Alan Cranston
New Senate Office Building
Washington, D. C. 20510

National League of Cities
The City Building
1620 Eye Street N. W.
Washington, D. C. 20006

City of Carson
701 East Carson Street
Carson, Calif. 90745

City of Hawthorne
4460 West 126th Street
Hawthorne, Calif. 90250

City of Inglewood
One Manchester Boulevard
Inglewood, Calif. 90301

City of Lomita
24300 Narbonne Avenue
Lomita, Calif. 90717

City of Palos Verdes Estates
340 Palos Verdes Drive W.
Palos Verdes Estates, Calif. 90274

City of Redondo Beach
415 Diamond Street
Redondo Beach, Calif. 90277

City of Rolling Hills Estates
4045 Palos Verdes Drive North
Rolling Hills Estates, Calif. 90274

RESOLUTION NO. 3671

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF GARDENA, CALIFORNIA, SUPPORTING AMENDMENTS TO THE CIVIL RIGHTS ACT AND OTHER RELATED PROVISIONS TO ADDRESS THE RECENT UNDUE EXPOSURE OF MUNICIPALITIES AND CITY OFFICIALS TO LIABILITY.

WHEREAS, cities perform a multitude of valuable services to the community and face ever challenging needs of society requiring action from the local body; and

WHEREAS, undue exposure to liability creates a restraint on government precluding necessary action; and

WHEREAS, such exposure via recent court decisions frustrates the proper exercise of discretion by local government; and

WHEREAS, local governments face financial restrictions now enhanced by undue and unpredictable liability exposure and this problem effects each and every city in the United States of America; and

WHEREAS, between June 1978 and June 1980 the United States Supreme Court decisions in Monell v. New York City, Owen v. City of Independence, and Maine v. Thiboutot marked the end of local government immunity to suits brought under §1983 of Title 42 of the United States Code, withdrew the availability to local government of a good faith defense, and recognized §1983 claims based on purely statutory violations of federal law; and

WHEREAS, at the same time municipalities have also been required to pay attorneys fees for successful §1983 plaintiffs in accordance with the Civil Rights Attorneys Fees Award Act of 1976; and

WHEREAS, in view of the Attorneys Fees Act and Monell, Owen and Thiboutot, the kinds of conduct for which a local government entity may be subjected to liability has become more varied while the number of available defenses has diminished; and

WHEREAS, as a result local governments are forced to bear substantial financial burdens; and

WHEREAS, this vastly expanded governmental liability appears to extend beyond the contemplation, goals, and intent of civil rights originally adopted by the 42nd Congress; and

WHEREAS, national legislative changes are necessary to provide realistic remedies for constitutional violations while preventing what now seems an inevitable paralysis of municipalities due to the already expensive civil rights litigation

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Gardena does hereby urge the immediate processing and passage of remedial legislation designed to re-establish appropriate immunities to local government from liability and to pass any and all necessary legislation to counter the tremendous negative effects on local government caused by the legal developments referred to above; and

BE IT RESOLVED, that this resolution be sent to every city in California recommending their support and transmittal to that city's congressional representatives; that this resolution be forwarded to all United States Senators; and

BE IT FURTHER RESOLVED, that this resolution be transmitted to the League of California Cities, the National League of Cities, and the National Institute of Municipal Law Officers for appropriate action; and

BE IT FURTHER RESOLVED, that this resolution shall take effect immediately; and

BE IT FURTHER RESOLVED, that the City Clerk shall certify to the passage and adoption of this resolution; shall cause the same to be entered among the original resolutions of said City; and shall make a minute of the passage and

///// /////
///// /////
///// /////
///// /////

adoption thereof in the records of the proceedings of the City Council of said City in the minutes of the meeting at which the same is passed and adopted.

Passed, approved and adopted this 13th day of January, 1981

/s/ EDMOND J. RUSS
Mayor of the City of Gardena,
California

ATTEST:

/s/ MAY Y. DOI
City Clerk

(SEAL)

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) SS.:
CITY OF GARDENA)

I, MAY Y. DOI, City Clerk of the City of Gardena, do hereby certify that the whole number of members of the City Council of said City is five; that the foregoing Resolution being Resolution No. 3671 , was duly passed and adopted by the City Council of said City of Gardena, approved and signed by the Mayor of said City, and attested by the City Clerk, all at a regular meeting of said City Council held on the 13th day of January , 1981 and that the same was so passed and adopted by the following roll call vote:

AYES: Councilmen Fukai, Nader, Dear, Tsukahara and Mayor Russ
NOES: None
ABSENT: None

/s/ MAY Y. DOI
City Clerk of the City of Gardena,
California

(SEAL)

CITY OF COLUMBIA
SOUTH CAROLINA
OFFICE OF THE CITY ATTORNEY / CITY HALL / POST OFFICE BOX 147 / COLUMBIA, S.C. 29217 / (803) 733-8247

January 22, 1981

Honorable Strom Thurmond
United States Senator
for the State of South Carolina
New Senate Office Building
Washington, D. C.

Dear Senator Thurmond:

The decision of the Supreme Court in Owen v. Independence, 100 S.Ct. 1398 (1980) denying the defense of good faith to municipal defendants in Civil Rights actions under 42 U.S.C. §1983, is a matter of grave concern to public bodies and their attorneys in South Carolina and the entire nation. It appears that the only relief rests with the Congress through amendments to the statute as proposed by NIMLO in the attached Bill. As Columbia City Attorney, I earnestly urge you to sponsor and work for the passage of these amendments.

These amendments have the support of the Municipal Association of South Carolina and other governmental groups in this State. At the Mid-Winter meeting of the Government Law Section of the South Carolina Bar, presided over by Leo Hill of Greenville, attorneys representing many agencies and subdivisions of the State voiced unanimous support for such an effort.

The NIMLO resolution is supported by such long-time city attorneys as Emmet Walsh of Spartanburg and Charlie Spencer of Rock Hill as well as the newer members of the South Carolina City Attorneys representing Greenville, Charleston, North Charleston, Aiken and many smaller cities.

It makes no sense to these attorneys that a city which can act only through its officers and employees cannot plead the good faith of those officers and employees in defense of civil rights actions. The proposed amendments are not only logical, fair and just, but are essential to the financial health of all subdivisions of government. Insurance costs, if coverage can be obtained, will be out of reach for most towns and cities. Risk management will be paramount to the provision of basic services which may suffer curtailment or require added tax burdens to maintain.

We have been relatively lucky in South Carolina, both in the number of civil rights actions brought and the treatment given to us by our courts. However, this new decision has opened the door to much litigation which will lack merit but will still require funds for defense and payments under a ruling which makes cities insurers with absolute liability for acts of employees who have immunity. This position is untenable.

We desperately need your help in this matter and we stand ready to furnish any information and support which may be needed if you will undertake the lead in this effort. Charlie Rhyne and his NIMLO staff in Washington will gladly coordinate the nationwide support of municipal attorneys and render any assistance within their broad capabilities.

We appreciate your consideration of this urgent request and we are secure in the confidence that it could not be placed in more capable hands.

Very truly yours,

Roy D. Bates

ROY D. BATES
City Attorney

RDB:d
Enclosure

cc: Emmet Walsh, Esquire
City Attorney
City of Spartanburg, S. C.

cc: C. W. F. Spencer, Jr., Esquire
City Attorney
City of Rock Hill, S. C.

cc: Leo Hill, Esquire
City Attorney
City of Greer, S. C.

cc: Municipal Association

Municipal Association of South Carolina
1213 Lady Street • P. O. Box 11558 • (803) 799-9574
Columbia, South Carolina 29211

A RESOLUTION

TO URGE THE UNITED STATES CONGRESS TO AMEND SECTIONS 1983 AND 1988 OF CHAPTER 42 OF THE UNITED STATES CODE SO AS TO LIMIT THE LIABILITY OF STATES AND POLITICAL SUBDIVISIONS FOR DAMAGES AND ATTORNEY'S FEES IN ACTIONS ALLEGING VIOLATIONS OF CIVIL RIGHTS.

WHEREAS, the Supreme Court of the United States has eliminated the "good faith" immunity of municipalities in civil rights actions, while maintaining such immunities for municipal officers and employees in the same suits, thereby creating a rule of absolute liability for municipalities in suits under the Civil Rights Act of 1871, 42 U. S. C. Section 1983; and

WHEREAS, Section 1983 suits may be brought for violations of federal statutes unrelated to civil rights, resulting in municipal liability for attorney's fees; and

WHEREAS, this ever-expanding liability causes an unusual and unreasonable hardship on municipalities, which are unable to manage personnel so as to reduce actions which result in liability, and which are unable, because of such liability, to effectively plan municipal affairs; and

WHEREAS, the only remedy to this situation is legislation amending Sections 1983 and 1988.

NOW THEREFORE BE IT RESOLVED by the Board of Directors of the Municipal Association of South Carolina that the Senate and House of Representatives of the United States in Congress assembled, be hereby urged to amend Sections 1983 and 1988 of Chapter 42 of the United States Code so as to restore the "good faith" immunity to the States and political subdivisions by providing that they shall be immune from liability for damages where the act complained of was performed in good faith by its officials or employees, and so as to eliminate the provision of attorney's fees.

Adopted this 14th day of January, 1981.

Joseph P. Riley, Jr.
JOSEPH P. RILEY, JR.
President

ATTEST:

George R. Hundley
GEORGE R. HUNDLEY
General Counsel

City of
Pensacola

*Office of the
City Attorney*

*America's First Settlement
And Most Historic City*

February 25, 1981

Charles Rhyne, Esquire
NIMLO
Suite 800
1000 Conecticut Avenue, NW
Washington, DC 20036

Re: Resolution Supporting Proposed
Legislation to Amend 42 USC §1983

Dear Mr. Rhyne:

Please find enclosed a certified copy of Resolution No. 7-81 passed by the Pensacola City Council on February 12, 1981 which Resolution indicates the support of the City Council for the proposed legislation to amend 42 USC §1983.

Please let us know if we can be of any further assistance in this matter.

Sincerely yours,

Diane L. Cheney
Diane L. Cheney
Secretary to City Attorney

Enclosure

P. O. Box 12910 Pensacola, Florida 32521 (904) 436-4111

ITEM 12-B

CERTIFICATION

I DO HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS A TRUE AND CORRECT COPY OF THE ORIGINAL THEREOF ON FILE IN MY OFFICE. WITNESS MY HAND AND THE CORPORATE SEAL OF THE CITY OF PENSACOLA, FLORIDA THIS THE 24th DAY OF February, 1981

Pauline Johns
CITY CLERK OF THE
CITY OF PENSACOLA, FLORIDA

RESOLUTION
NO. 7-81

A RESOLUTION
TO BE ENTITLED:

A RESOLUTION SUPPORTING PROPOSED LEGISLATION TO AMEND 42 USC §1983 TO PROVIDE THAT MUNICIPAL DEFENDANTS SHALL HAVE AVAILABLE TO THEM A GOOD-FAITH DEFENSE TO CIVIL RIGHTS ACTIONS FILED AGAINST THEM AND AGREEING WITH THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN THEIR SUPPORT OF THIS LEGISLATION.

WHEREAS, the Supreme Court of the United States in the case of Owen v. City of Independence, 446 US ____ (1980), created a rule of absolute liability for municipal defendants in suits under the Civil Rights Act of 1871, 42 USC §1983, while retaining the good-faith defense for municipal officers and employees in the same suits; and

WHEREAS, this creates an unworkable rule for the Courts to administer and creates difficulties in the management of municipal personnel so as to reduce liability-provoking acts; and

WHEREAS, since the Owen rule was based on a construction of the intent of Congress in 1871, the only remedy for this troublesome anomaly now is legislation amending §1983; NOW, THEREFORE,

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF PENSACOLA, FLORIDA:

SECTION 1. That the City Council of the City of Pensacola fully supports the attached proposed legislation to amend 42 USC §1983 to provide that municipal defendants shall have available to them a good-faith defense on the same terms as such a defense is available to their municipal employees.

SECTION 2. This Resolution shall take effect immediately upon its adoption by the City Council and shall be published as required by law.

Adopted: February 12, 1981

Approved: s/ Vince Whibbs
MAYOR

Attest:

s/ Pauline Johns
City Clerk

Legal in form and valid if adopted:

s/ Don J. Caton
City Attorney

A BILL

To amend section 1979 of the Revised
Statutes to limit the liability of
political subdivisions based on violations of civil rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Revised Statutes section 1979 (42 USC 1983) is amended by adding the words "civil rights" immediately before "laws" and by adding at the end thereof the following: "In any action, suit or proceeding under the provisions of this section, a political subdivision of a State, including a municipality, county, town, borough, parish, village or school district, shall be immune from liability for damages where the act complained of was performed in good faith by its officials or employees."

March 23, 1981

National Institute of Municipal Law Officers
1000 Connecticut Av. N.W., Suite 800
Washington, D.C. 20036

Gentlemen:

Enclosed please find a certified copy of Resolution No. 3872 of the City Council of the City of Manhattan Beach, supporting amendments to the Civil Rights Act.

It is hoped this Resolution will encourage remedial legislation protecting municipal governments, and their officials, from undue exposure to liability. This liability is largely the result of United States Supreme Court decisions in Monell v. New York City, Owen v. City of Independance, and Main v. Thiboutot. Such legislative changes are necessary to provide realistic remedies for constitutional violations while preventing what now seems to be an inevitable paralysis of municipalities due to civil rights legislation.

Sincerely,

RUSSELL F. LESSER
Mayor

RFL:da
Enclosure

City Hall 1400 Highland Avenue, Manhattan Beach, California 90266 · (213) 545-5621

RESOLUTION NO. 3872

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MANHATTAN BEACH, CALIFORNIA, SUPPORTING AMENDMENTS TO THE CIVIL RIGHTS ACT AND OTHER RELATED PROVISIONS TO ADDRESS THE RECENT UNDUE EXPOSURE OF MUNICIPALITIES AND CITY OFFICIALS TO LIABILITY

WHEREAS, cities perform a multitude of valuable services to the community and face ever challenging needs of society requiring action from the local body; and

WHEREAS, undue exposure to liability creates a restraint on government precluding necessary action; and

WHEREAS, such exposure via recent court decisions frustrates the proper exercise of discretion by local government; and

WHEREAS, local governments face financial restrictions now enhanced by undue and unpredictable liability exposure and this problem affects each and every city in the United States of America; and

WHEREAS, between June, 1978, and June, 1980, the United States Supreme Court decisions in Monell v. New York City, Owen v. City of Independence, and Maine v. Thiboutot marked the end of local government immunity to suits brought under Section 1983 of Title 42 of the United States Code, withdrew the availability to local government of a good faith defense, and recognized Section 1983 claims based on purely statutory violations of federal law; and

WHEREAS, at the same time, municipalities have also been required to pay attorneys fees for successful Section 1983 plaintiffs in accordance with the Civil Rights Attorneys Fees Award Act of 1976; and

WHEREAS, in view of the Attorneys Fees Act and Monell, Owen and Thiboutot, the kinds of conduct for which a local government entity may be subjected to liability has become more varied while the number of available defenses had diminished; and

WHEREAS, as a result local governments are forced to bear substantial financial burdens; and

WHEREAS, this vastly expanded governmental liability appears to extend beyond the contemplation, goals, and intent of civil rights originally adopted by the 42nd Congress; and

WHEREAS, national legislative changes are necessary to provide realistic remedies for constitutional violations while preventing what now seems an inevitable paralysis of municipalities due to the already expensive civil rights litigation;

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Manhattan Beach does hereby urge the immediate processing and passage of remedial legislation designed to re-establish appropriate immunities to local government from liability and to pass any and all necessary legislation to counter the tremendous negative effects on local government caused by the legal developments referred to above; and

BE IT RESOLVED, that this resolution be sent to the United States Senators representing the City of Manhattan Beach in the Congress, recommending their support; and

BE IT FURTHER RESOLVED, that this resolution be transmitted to the League of California Cities, the National League of Cities, and the National Institute of Municipal Law Officers for appropriate action.

PASSED, APPROVED and ADOPTED this 17th day of March, 1981.

Ayes:	Blumberg, Holmes, Sweeney, Switzer, and Mayor Lesser
Noes:	None
Absent:	None
Abstain:	None

/s/ Russell F. Lesser

Mayor, City of Manhattan Beach,
California

ATTEST:

/s/ John Allan Lacey
City Clerk

Certified to be a true copy
of the original of said
document on file in my
office.

John Allan Lacey
City Clerk of the City of
Manhattan Beach, California

RESOLUTION

No. 81 - 4

A RESOLUTION OF THE CITY COMMISSION OF THE CITY OF CLEARWATER, FLORIDA, SUPPORTING THE FLORIDA LEAGUE OF CITIES AND THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN THEIR EFFORTS TO AMEND 42 U.S.C. §1983 TO MAKE THE GOOD-FAITH DEFENSE AVAILABLE TO MUNICIPALITIES.

WHEREAS, the United States Supreme Court, through interpretation of 42 U.S.C. §1983 in the Monell, Owen and Thiboutot cases, has greatly expanded the liability of municipalities in the area of civil rights actions; and

WHEREAS, in the space of two years that liability has gone from immunity absolute in character to one of strict liability; and

WHEREAS, it is necessary to resolve a real inequity created through interpretation of the statute in order that municipalities can avail themselves of the good-faith defense the same as officials and other employees; and

WHEREAS, the Florida League of Cities and the National Institute of Municipal Law Officers are supporting the attached bill which is being submitted to Congress; and

WHEREAS, the City Commission of the City of Clearwater, Florida, wishes to support the attached bill and also wishes to request that the State Legislature pass a memorial to Congress requesting that they take action on the bill during their next session;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COMMISSION OF THE CITY OF CLEARWATER, FLORIDA, IN SESSION DULY AND REGULARLY ASSEMBLED, AS FOLLOWS:

1. That the City Commission of the City of Clearwater, Florida, supports and urges passage of the bill attached to this Resolution as Exhibit 1, which bill if passed could amend 42 U.S.C. §1983 to make the defense of good-faith available to the municipality as well as its other officials and employees.

2. That the City Commission of the City of Clearwater requests the Pinellas County Legislative Delegation to urge the passage of a memorial to Congress requesting immediate consideration of the attached bill.

3. That a copy of this Resolution be provided to the Florida League of Cities, the National Institute of Municipal Law Officers, the Chairperson of the Pinellas County Legislative Delegation, Senator Lawton Chiles, Senator Paula Hawkins, Representative C. W. Bill Young, Representative William McCollum, and to Senator Strom Thurmond of the Senate Judiciary Committee.

4. That this Resolution shall take effect immediately upon its adoption.

PASSED AND ADOPTED this 8th day of January, A.D. 1981.

/s/ Charles F. LeCher
Mayor-Commissioner

Attest:
/s/ Lucille Williams
City Clerk

AMENDMENT OF THE CIVIL RIGHTS ACT OF 1871

WHEREAS the Supreme Court of the United States in *Owen v. City of Independence*, 446 U.S. ___ (1980) created a rule of absolute liability for municipal defendants in suits under the Civil Rights Act of 1871, 42 U.S.C. section 1983, while retaining the good-faith defense for municipal officers and employees in the same suits;

WHEREAS this creates an unworkable rule for the courts to administer, and creates difficulties in the management of municipal personnel so as to reduce liability-provoking acts;

WHEREAS, since the *Owen* rule was based on a construction of the intent of Congress in 1871, the only remedy for this troublesome anomaly now is legislation amending section 1983;

NOW THEREFORE BE IT RESOLVED that the National Institute of Municipal Law Officers fully supports the attached proposed legislation to amend 42 U.S.C. section 1983 to provide that municipal defendants shall have available to them a good-faith defense on the same terms as such a defense is available to their municipal employees.

A BILL

To amend section 1979 of the Revised Statutes to limit the liability of political subdivisions based on violations of civil rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Revised Statutes section 1979 (42 U.S.C. 1983) is amended by adding the words "civil rights" immediately before "laws" and by adding at the end thereof the following: "In any action, suit or proceeding under the provisions of this section, a political subdivision of a State, including a municipality, county, town, borough, parish, village or school district, shall be immune from liability for damages where the act complained of was performed in good faith by its officials or employees."

Section 2. The amendment made by the first section of this Act shall take effect upon the date of its enactment.

EXHIBIT 1

Section 1983 Amendment

Memorandum in Support

TITLE OF BILL: A Bill to amend section 1979 of the Revised Statutes to limit the liability of political subdivisions based on violations of civil rights.

SUMMARY OF PROVISIONS: This bill would amend Revised Statutes section 1979 (42 U.S.C. section 1983) by limiting its scope to violations of the Constitution and civil rights statutes, and by providing that political subdivisions shall be immune from liability for damages where the act complained of was performed in good faith by their officials or employees.

REASONS FOR SUPPORT: Several recent Supreme Court decisions have expanded municipal liability under 42 U.S.C. section 1983. These decisions greatly increase the financial burdens on municipalities and have misinterpreted the intention of Congress in enacting the Civil Rights Act of 1871.

In *Monroe v. Pape*, 365 U.S. 167 (1961), the Court, in an opinion written by Justice Douglas, held that a municipality is not a "person" within the meaning of section 1983, thus making it wholly immune from suit. The Court found that the Civil Rights Act of 1871 was directed primarily at the tide of organized violence being perpetrated in the South by the Ku Klux Klan. *Id.* at 174-80. In its analysis, the Court stressed the congressional debate and rejection of the Sherman amendment, which would have held a municipal corporation liable for damages to the person or property of its inhabitants by private persons "riotously and tumultuously assembled."

The decision in *Monroe* that municipalities were wholly immune from liability for damages under section 1983, was acquiesced in by Congress, which did not pass any amendments to the section. From 1961 to 1977, the number of cases brought in the federal courts under civil rights statutes increased from 296 to 13,113; and it has been estimated that in fiscal 1976, almost one-third of all the private federal cases filed were civil rights suits against state and local officials. Note, *Monell v. Department of Social Services: One Step Forward and a Half Step Back for Municipal Liability under Section 1983*, 7 Hofstra L. Rev. 893 (1979).

In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), a class action suit filed by female employees of the social services department and the board of education challenging an official policy that compelled pregnant employees to take unpaid leaves of absence regardless of whether such leaves were required for medical reasons, the Court overruled *Monroe*. The Court held that local governments may be sued under section 1983 where the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers, or where the constitutional violation occurs pursuant to governmental custom, even if such custom has not received formal approval through the government's official decision-making channels. *Monell* emphasized in *dicta*, however, that a municipality cannot be held liable under section 1983 on a *respondeat superior* theory.

The *Monell* court left open the question of what defenses, absolute or qualified, a municipality might raise to section 1983 actions, which question was answered unfavorably to municipalities in *Owen v. City of Independence*, 100 S.Ct. 1398 (1980). That case held that, unlike individuals, who may assert "good faith" as a defense to liability under section 1983, municipalities may not assert the good faith of their officials or employees as a defense to such liability. The case imposes strict liability for constitutional violations upon municipalities, ignoring a vast weight of common-law precedent which allowed municipalities a good faith defense.

Most recently, *Maine v. Thiboutot*, 43 U.S.L.W. 4859 (1980), held that section 1983 encompasses claims based on purely statutory violations of federal law, and that, under section 1988, attorneys' fees may be awarded to the prevailing party in such actions. Municipalities are now strictly liable for errors in the administration of complex federal statutes, imposing a crushing financial burden on local defendants.

Class action suits under section 1983 will increase greatly the cost to cities of the recent Supreme Court decisions. Although named plaintiffs themselves may sustain legitimate injuries, the cost of complying with class action judgments based on purely statutory violations of federal law is extraordinary. In addition, plaintiff's attorneys will obtain fees under section 1988, further increasing the costs to municipalities.

Further, the use of section 1983 as a catch-all civil rights act is inappropriate, because adequate procedures and remedies for civil rights violations exist in the Civil Rights Acts of 1964 and 1972. The remedies set forth therein include an injunction, reinstatement, back pay or other equitable relief. See 42 U.S.C. section 2000e-5(g).

Also, local government was much simpler in 1871 when section 1983 was enacted. There were no federal regulatory statutes, no social welfare statutes, and no civil service. Section 1983 was never intended to include violations of these laws within its scope.

The proposed amendment alters the holding in *Thiboutot* by limiting suits under section 1983 to those involving constitutional or civil rights claims, thus restoring to section 1983 its original purpose and meaning. The amendment alters the holding in *Owen* by providing a political subdivision with immunity from liability for damages where the act complained of was performed in good faith by its officials or employees.

Plaintiffs will still be able to utilize section 1983 under the proposed amendment and our cities will be given the good faith defense which the drafters of section 1983 intended to exist. As Learned Hand stated:

> There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors.

[*Gregoire v. Biddle*, 177 F.2d (2nd Cir. 1949)].

The proposed amendment, by protecting plaintiffs' ability to sue for legitimate injuries and by protecting local governments from unjustified payments based on the honest errors of its employees, is truly an equitable addition to our federal statutes.

STEVE
PLEASE
RESPOND

City of Cambridge
Cambridge, Maryland 21613

EXECUTIVE DEPARTMENT

AREA CODE 301
TELEPHONE 228-4020

January 8, 1981

Honorable Orrin G. Hatch
United States Senate
Washington, D. C. 20510

Dear Senator Hatch:

Senator Mathias was kind enough to send me copies of S3114 and S3115 which you introduced in the 96th Congress. I would like to commend you highly for your efforts to correct a horrendous situation created by the courts.

I am taking the liberty of enclosing a copy of a Resolution adopted by the City of Cambridge pertaining to this area and wish you the greatest of success in any forthcoming endeavors along this line.

With sincerest regards, I am

Very truly yours,

Richard M. Matthews
City Attorney
314 High Street
Cambridge, Maryland 21613

RMM:ww
Enclosure

RESOLUTION

RESOLUTION OF THE COMMISSIONERS OF CAMBRIDGE, MARYLAND, REQUESTING CONGRESS TO AMEND THE CIVIL RIGHTS ACT OF 1871, 42 U.S.C. Sec. 1983.

WHEREAS, the Supreme Court of the United States of America in *Owen* v. *City of Independence*, 446 U.S. ___ (1980) created a rule of absolute liability for municipal defendants in suits under the Civil Rights Act of 1871, 42 U.S.C., Sec. 1983, while retaining the good-faith defense for municipal officers and employees in the same suits; and

WHEREAS, this creates an unworkable rule for the courts to administer and creates difficulties in the management of municipal personnel so as to reduce liability-provoking acts; and

WHEREAS, it has heretofore been recognized that the wording of said Civil Rights Act of 1871 leaves much to be desired and, as a matter of fact, Justice Frankfurter in *United States* v. *Williams* stated as follows: "The dominant conditions of the reconstruction period were not conducive to the enactment of carefully considered and coherent legislation. Strong post war feelings caused inadequate deliberation and led to loose and careless phrasing of laws related to the new political issues." and

WHEREAS, since the *Owen* rule was based on a construction of the intent of Congress in 1871, the only remedy for this troublesome anomaly now is legislation amending Sec. 1983.

NOW, THEREFORE, BE IT RESOLVED by The Commissioners of Cambridge, Maryland that it fully supports the attached proposed legislation to amend 42 U.S.C. Sec. 1983 to provide that municipal defendants shall have available to them a good-faith defense on the same terms as such a defense is available to their municipal employees.

City of Cambridge
Cambridge, Maryland

THE COMMISSIONERS OF CAMBRIDGE,
MARYLAND

ATTEST:
Kenneth L. Hughes
Kenneth L. Hughes
Clerk

By: (SEAL)
C. Lloyd Robbins
Mayor

APPROVED this 1st day of December, 1980.

C. Lloyd Robbins
Mayor

A BILL

To amend Section 1979 of the Revised
Statutes to limit the liability of
political subdivisions based on
violations of civil rights.

BE IT ENACTED by the Senate and House of Representatives of the United States of America in Congress assembled, that the Revised Statutes Section 1979 (42 U.S.C. 1983) is amended by adding the words "civil rights" immediately before "laws" and by adding at the end thereof the following: "In any action, suit or proceeding under the provisions of this section, a political subdivision of a State, including a municipality, county, town, borough, parish, village or school district, shall be immune from liability for damages where the act complained of was performed in good faith by its officials or employees."

Sec. 2. The amendment made by the first section of this Act shall take effect upon the date of its enactment.

Sec. 1983 Amendment

MEMORANDUM IN SUPPORT

TITLE OF BILL: A Bill to amend Section 1979 of the Revised Statutes to limit the liability of political subdivisions based on violations of civil rights.

SUMMARY OF PROVISIONS: This bill would amend Revised Statutes Section 1979 (42 U.S.C. Sec. 1983) by limiting its scope to violations of the Constitution and civil rights statutes, and by providing that political subdivisions shall be immune from liability for damages where the act complained of was performed in good faith by their officials or employees.

REASONS FOR SUPPORT: Several recent Supreme Court decisions have expanded municipal liability under 42 U.S.C. Sec. 1983. These decisions greatly increase the financial burdens on municipalities and have misinterpreted the intent of Congress in enacting the Civil Rights Act of 1871.

In *Monroe* v. *Pape*, 365 U.S. 167 (1961) the Court, in an opinion written by Justice Douglas, held that a municipality is not a "person" within the meaning of Sec. 1983, thus making it wholly immune from suit. The Court found that the Civil Rights Act of 1871 was directed primarily at the tide of organized violence being perpetrated in the South by the Klu Klux Klan. *Id*. at 174-80. In its analysis, the Court stressed the congressional debate and rejection of the Sherman amendment, which would have held a municipal corporation liable for damages to the person or property of its inhabitants by private persons "riotously and tumultuously assembled."

In *Monell* v. *Department of Social Services*, 436 U.S. 658 (1976), a class action suit filed by female employees of the social services department and the board of education challenging an official policy that compelled pregnant employees to take unpaid leaves of absence regardless of whether such leaves were required for medical reasons, the court overruled *Monroe*. The Court held that local governments may be sued under Sec. 1983 where the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers, or where the constitutional violation occurs pursuant to governmental custom, even if such custom has not received formal approval through the government's official decision-making channels. *Monell* emphasized in *dicta*, however, that a municipality cannot be held liable under Sec. 1983 on a *respondeat superior* theory.

The *Monell* court left open the question what defenses, absolute or qualified, a municipality might raise to Sec. 1983 actions, which question was answered unfavorably to municipalities in *Owen* v. *City of Independence*, 100 S. Ct. 1398 (1980). That case held that, unlike individuals, who may assert "good faith" as a defense to liability under Sec. 1983, municipalities may not assert the good faith of their officials or employees as a defense to such liability. The case imposes strict liability for constitutional violations upon municipalities, ignoring a vast weight of common-law precedent which allowed municipalities a good faith defense.

Most recently, *Maine* v. *Thiboutot*, 43 U.S.L.W. 4859 (1980), held that Sec. 1983 encompasses claims based on purely statutory violations of federal law, and that, under Sec. 1988, attorneys' fees may be awarded to the prevailing party in such actions. Municipalities are now strictly liable for errors in the administration of complex federal statutes, imposing a crushing financial burden on local defendants.

Class action suits under Sec. 1983 will increase greatly the cost to cities of the recent Supreme Court decisions. Although named plaintiffs themselves may sustain legitimate injuries, the cost of complying with class action judgments based on purely statutory violations of federal law is extraordinary. In addition, plaintiff's attorneys will obtain fees under Sec. 1988, further increasing the costs to municipalities.

Further, the use of Sec. 1983 as a catch-all civil rights act is inappropriate, because adequate procedures and remedies for civil rights violations exist in the Civil Rights Acts of 1964 and 1972. The remedies set forth therein include an injunction, reinstatement, back pay or other equitable relief. See 42 U.S.C. Sec. 2000c-5(g).

Also, local government was much simpler in 1871 when Sec. 1983 was enacted. There were no federal regulatory statutes, no social welfare statutes, and no civil service. Sec. 1983 was never intended to incluse violations of these laws within its scope.

The proposed amendment alters the holding in Thiboutot by limiting suits under Sec. 1983 to those involving constitutional or civil rights claims, thus restoring to Sec. 1983 its original purpose and meaning. The amendment alters the holding in Owen by providing a political subdivision with immunity from liability for damages where the act complained of was performed in good faith by its officials or employees.

Plaintiffs will still be able to utilize Sec. 1983 under the proposed amendment and our cities will be given the good faith defense which the drafters of Sec. 1983 intended to exist. As Learned Hand stated:

> "There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors."

Gregoire v. Biddle, 177 F. 2d 579 (2nd Cir. 1949).

The proposed amendment, by protecting plaintiffs' ability to sue for legitimate injuries and by protecting local governments from unjustified payments based on the honest errors of its employees, is truly an equitable addition to our federal statutes.

City of Hallandale
FLORIDA

ADMINISTRATIVE OFFICES
308 S. DIXIE HWY
PHONE 458-3251

February 27, 1981

Gentlemen:

Attached is a copy of Hallandale Resolution No. 81-06, as follows:

RESOLUTION NO. 81-06

A RESOLUTION BY THE CITY OF HALLANDALE,
FLORIDA, URGING AN AMENDMENT TO 42 U.S.
CODE, SECTIONS 1983 AND 1988 TO PROVIDE
FOR A GOOD FAITH DEFENSE FOR MUNICIPALITIES

This Resolution was approved and adopted by the City Commission of the City of Hallandale, Florida on February 24, 1981.

CITY OF HALLANDALE

JUNE B. WATTS
CITY CLERK

JBW:sd

RESOLUTION NO. 81-06

A RESOLUTION BY THE CITY OF HALLANDALE,
FLORIDA, URGING AN AMENDMENT TO 42 U.S.
CODE, SECTIONS 1983 AND 1988 TO PROVIDE FOR
A GOOD FAITH DEFENSE FOR MUNICIPALITIES

WHEREAS, the Supreme Court of the United States in Owen v. City of Independence, 446 U.S. (1980) created a rule of absolute liability for municipal defendants in suits under the Civil Rights Act of 1871, 42 U.S.C. §1983, while retaining the good faith defense for municipal officers and employees in the same suits; and

WHEREAS, §1983 actions may also be brought for violations of federal statutes unrelated to civil rights and, in all §1983 actions, attorneys fees are available to prevailing plaintiffs; and

WHEREAS, this creates an unworkable rule for the courts to administer and creates difficulties in the management of municipal personnel so as to reduce liability-provoking acts; and

WHEREAS, since the Owen rule was based on a construction of the intent of Congress in 1871, the only remedy for this troublesome anomaly now is legislation amending §§ 1983 and 1988.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COMMISSION OF THE CITY OF HALLANDALE, FLORIDA:

SECTION 1. That the City of Hallandale fully supports the attached proposed legislation to amend 42 U.S.C. §1983 and 1988 to provi that municipal defendants shall have available to them a good faith defense in the same terms as such a defense is available to municipal employees.

SECTION 2. That the Florida legislature is urged to adopt a memorial to the Congress to urge adoption of legislation in accordance with the amendment attached hereto so that the fiscal integrity of Florida municipalities may be preserved and maintained.

APPROVED AND ADOPTED this 24th day of FEBRUARY 198

ATTEST:

MAYOR-COMMISSIONER

CITY CLERK

A BILL

To amend section 1979 of the Revised Statutes to limit the liability of political subdivisions based on violations of civil rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Revised Statutes section 1979 (42 U.S.C. 1983) is amended by adding the words "civil rights" immediately before "laws" and by adding at the end thereof the following: "In any action, suit or proceeding under the provisions of this section, a political subdivision of a State, including a municipality, county, town, borough, parish, village or school district, shall be immune from liability for damages where the act complained of was performed in good faith by its officials or employees."

Section 2. The amendment made by the first section of this Act shall take effect upon the date of its enactment.

City of Miami Beach
FLORIDA

JOHN A. RITTER
CITY ATTORNEY

P.O. BIN 190000
MIAMI BEACH, FLORIDA 33119
TELEPHONE: 673-7470

April 6, 1981

Honorable Paula Hawkins
1327 Dirksen Senate Office Bldg.
Washington, D. C. 20510

Re: Municipal Liability

Dear Senator Hawkins:

I would like to request your help in proposing and supporting legislation to help American cities. As you may know, federal courts are being flooded with lawsuits alleging "civil rights" violations. Recent court decisions have expanded the potential liability of these suits to city government and, accordingly, expanded the burden to local taxpayers.

Enclosed is a resolution of my City Commission unanimously urging Congress to give consideration to helping local government by action at the federal level to amend and limit 42 U.S.C. §§ 1983 and 1988 by enacting new legislation.

Please give it your consideration and support.

Best regards.

Yours very truly,

John Ritter

John A. Ritter

JAR/cm
Enc.

RESOLUTION NO. 81-16532

A RESOLUTION OF THE CITY COMMISSION OF THE CITY
OF MIAMI BEACH, URGING CONGRESS TO AMEND THE
CIVIL RIGHTS ACT TO PRESERVE QUALIFIED MUNICIPAL
IMMUNITY UNDER THE ACT.

WHEREAS, the Supreme Court of the United States in Owen v. City of Independence, 446 U.S. ___, 100 S.Ct. 1398 (1980), created a rule of absolute liability for municipal defendants in suits under the Civil Rights Act of 1871, 42 U.S.C. §1983, while retaining the good-faith defense for municipal officers and employees in the same suits; and

WHEREAS §1983 actions may also be brought for violations of federal statutes not directly related to civil rights, and, in all §1983 actions, attorneys fees are available to prevailing plaintiffs; and

WHEREAS, the Supreme Court's adoption of a rule of unqualified liability by taxpayers for even the good-faith errors of their local representatives endangers the traditional responsiveness of local government to its constituents, and impairs the experimentation by local governments which is the cornerstone of our federal system; and

WHEREAS it is needlessly complex to create one rule of liability for governmental entities and another for their officers and employees acting in the course of employment; and

WHEREAS the State of Florida, through its Constitution and laws, has already waived sovereign immunity and determined the liability of municipalities and their officers and employees under the Civil Rights Act and other Federal and State claims, which determination should be respected by Congress pursuant to the Ninth and Tenth Amendments to the United States Constitution; and

WHEREAS, since the Owen rule was based on a construction of the intent of Congress, the only remedy is legislation amending §1983 and 1988:

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, that it respectfully urges Congress to amend 42 U.S.C. §1983 and 1988 to provide that municipal defendants shall have available to them a good-faith defense on the same terms available to their municipal employees, or to the States, and to provide that the "laws" incorporated by said Act are limited to civil rights laws, and to eliminate the availability of attorney's fees to prevailing plaintiffs in actions against municipalities.

PASSED and ADOPTED this 21st day of January, 1981.

Mayor

Attest:

Elaine Matthews
City Clerk

APPROVED
LEGAL DEPT.

By TWP
Date Jan 7, 1981

City of Fort Worth, Texas

Mayor and Council Communication

HERCHERT
WALKER
SANTERRE
ISHAM ✓

DATE	REFERENCE NUMBER	SUBJECT:	PAGE
4/7/81	G-4944	Additional Legislative Proposals	1 of 1

Background

Additional bills continue to be introduced in the Texas Legislature and the Congress of the United States which have an impact on municipalities. The attached two proposals consist of one bill that would be detrimental to City operations and one that would assist cities.

Recommendation

It is recommended that the City Council:

1) Approve the attached legislative policy statements; and

2) Authorize the City Manager and/or City Attorney to convey such policy statements to the appropriate legislative representatives.

PAI:jc

RECEIVED
APR 2 1981
DEPT. OF LAW

APPROVED BY
CITY COUNCIL

APR 7 1981

City Secretary of the
City of Fort Worth, Texas

SUBMITTED FOR THE CITY MANAGER'S OFFICE BY: Robert L. Herchert	DISPOSITION BY COUNCIL: ☐ APPROVED	PROCESSED BY
ORIGINATING DEPARTMENT HEAD: Paul Isham	☐ OTHER (DESCRIBE)	CITY SECRETARY
FOR ADDITIONAL INFORMATION CONTACT: Paul Isham Ext. 7623		DATE

City of Fort Worth

STATEMENT OF POLICY

April 7, 1981

COUNCIL SUPPORT IN AMENDING 42 U.S.C., SECTION 1983

ISSUE:

The Civil Rights Act of 1871, as amended, (42 U.S.C., Section 1983) provides that every person who deprives any other person of any rights, privileges or immunities secured by the Constitution and laws of the United States shall be liable to the party injured in a civil action. In light of recent cases decided by the Supreme Court of the United States, municipalities have been exposed to liability under Section 1983 and numerous lawsuits have been filed against cities and city employees. The National Institute of Municipal Law Officers (NIMLO) has done a survey of cities across the country, and of 174 cities out of a possible 1000 reporting to them as of March 1, 1981, 4 billion dollars worth of Section 1983 claims are pending against those cities. The City of Fort Worth presently has Section 1983 suits pending against it in which the total amount alleged in damages exceeds 12 [illegible]illion dollars. In addition to the claims themselves, a prevailing plaintiff in a Section 1983 case may recover their reasonable attorney fees. Often these fees exceed the amount of damages, as in a recent case in another city where a claim resulting in a back pay judgment of $33,000 produced a fee of $160,000.

NIMLO has proposed two possible solutions to this problem. First, an amendment to Section 1983 is needed to limit its coverage to that originally intended, namely civil rights violations. Under the present state of law, a municipal employee or officer may have a good faith immunity or defense to his acts, but the municipality itself is not immune from the acts of its employees even though, th may have been in good faith. The suggested amendment to the act would allow citie to have the same immunities and defenses that their employees have. Additionally, the proposed amendment would eliminate the award of attorney's fees in damage actions.

Second, NIMLO is proposing the creation of a national defense fund. Many Section 1983 claims and lawsuits are purposely brought against small cities so that the resources of the small city will be overpowered. These jurisdictions can use the help of a team of expert lawyers and technical experts, the kind of experts some cities cannot afford to pay for, train or find. Many of the cases that are brought against small cities are actual test cases that will eventually determine the law for all cities. It is imperative that all municipalities unite in an effort to properly protect the interests and liabilities of cities. If a national municipal defense fund is established, each city would contribute to such fund on some type of prorata or per capita basis, and all cities would be eligible for assistance through the fund.

POLICY:

It is recommended that the City Council support proposed legislation amending Section 1983 of 42 U.S.C., that the City Attorney be directed to take steps to notify our United States Congressmen and Senators of this action, and that the City Attorney be instructed that the City of Fort Worth supports the formation of a national legal defense fund for municipalities.

WALTER M. POWELL
MUNICIPAL COUNSELOR

OFFICE OF THE MUNICIPAL COUNSELOR
THE CITY OF OKLAHOMA CITY
MUNICIPAL BUILDING • OKLAHOMA CITY, OKLAHOMA 73102
TEL.: AC 405 231-2431

April 20, 1981

Senator Don Nickles
123 Russel Office Building
Washington, D.C. 20510

Dear Senator Nickles:

Senator Hatch of Utah, the Chairman of the Subcommittee on the Constitution of the Senate Judiciary Committee, has introduced S.584 and S.585. The Senator plans to hold hearings on the general topic of amendment of §1983 in May, probably May 6. S.584 would limit the federal "laws" whose violation triggers a §1983 cause of action to laws "providing for equal rights of citizens or of all persons within the United States." This would have the effect of "overruling" Maine v. Thiboutot, 448 U.S. ____ (1980) on this point. S.585 would address the problem of Owen v. City of Independence, 445 U.S. 622 (1980) by barring an action against a local government which "acted in good faith with a reasonable belief that the actions of the political subdivision were not in violation of any rights, privileges, or immunities secured by the Constitution or by laws providing for equal rights of citizens or persons."

This legislation is necessary for the survival of municipalities throughout the country. The enclosed brochure explains in detail how the current status of Civil Rights Laws threaten to bankrupt every city treasury. This fiscal dilemma is particularly threatening to the budget of The City of Oklahoma City which is currently a party in twelve civil rights cases with potential liability of $20,511,967.00.

Several Oklahoma City officials also support the legislation proposed by Senator Hatch and have prepared an endorsement which concurs with that legislation and is attached hereto.

Please carefully study the enclosed brochure and the problems facing our municipalities. In these times when tax cuts are this Administration's foundation of inflation control, allowing massive civil right judgments to be assessed against municipalities without any legislative safeguards, will contribute to the great tax burden shared by all citizens. I ask you to support the proposals of Senator Hatch in his effort to solve this particular fiscal dilemma of municipalities.

Very truly yours,

Walter M. Powell

Walter M. Powell
Municipal Counselor

WMP:BSK:bg

Attachments

ENDORSEMENT

We, the undersigned officials of The City of Oklahoma City do hereby endorse United States Senator Hatch's proposed amendments which would limit the federal "laws" whose violation triggers a §1983 cause of action to laws "providing for equal rights of citizens or of all persons within the United States" and which amendment would bar any action against a local government which "acted in good faith with a reasonable belief that the actions of the political subdivision were not in violation of any rights, privileges or immunities secured by the Constitution or by laws providing for equal rights of citizens or persons."

Moreover, we the undersigned officials of The City of Oklahoma City believe that the present laws with the easy availability of attorney's fees in §1983 cases has encouraged the filing of claims which amount to prayers of $20,511,967.00 against The City of Oklahoma City.

We further believe that judicial intrusion caused by the strict liability concepts of recent Supreme Court decisions compounded by attorney fee availability will distort municipal decision making and restrict the independence of our local government and our ability to respond to community needs.

Thus, we would urge you to support the S.584 and S.585 proposed by Senator Hatch as we believe it would be in the best interests of the citizens of The City of Oklahoma City, as well as all taxpayers, to halt the proliferation of civil rights litigation.

Respectfully submitted,

Bill H. Bridges
Councilperson

R. M. Frank
Councilperson

Marjory P. Ferguson
Councilperson

Patience Latting
Mayor

Councilperson

Bob McCoy
Councilperson

Councilperson

City of Lakeland
WORLD CITRUS CENTER
LAKELAND, FLORIDA 33802

April 24, 1981

The Honorable Orrin G. Hatch
125 Russell Senate Office Building
Washington, D. C. 20510

Sir:

I have enclosed a certified copy of Resolution No. 2567 adopted by the City Commission of the City of Lakeland at its meeting of April 20, 1981.

The City Commission of the City of Lakeland, by its Resolution, supports the concept embodied in Senate Bills 584 and 585. The City Commission urges your support in the passage of this legislation.

Sincerely yours,

Huretta Bassett
Huretta Bassett
City Clerk

HB:cse

Enc.

RESOLUTION NO. 2567

PROPOSED RESOLUTION NO. 81-56

A RESOLUTION RELATING TO CIVIL RIGHTS LITIGATION; EXPRESSING SUPPORT FOR LEGISLATION LIMITING THE LIABILITY OF MUNICIPALITIES; EXPRESSING SUPPORT FOR S. 584 AND S. 585; URGING THE MEMBERS OF CONGRESS FROM FLORIDA TO SUPPORT SUCH LEGISLATION; AUTHORIZING DISTRIBUTION OF COPIES OF THE RESOLUTION; PROVIDING AN EFFECTIVE DATE.

WHEREAS, in 1871, Congress enacted a civil rights statute designed to protect citizens from deprivation of their civil rights; and

WHEREAS, that statute, codified as 42 U.S.C. §1983, was little used in litigation for over one hundred years; and

WHEREAS, based upon the 1961 U.S. Supreme Court decision of Monroe v. Pape, municipalities enjoyed an immunity from litigation under that statute; and

WHEREAS, in 1978, the Supreme Court reversed itself and in the case of Monell v. Department of Social Services, and held that municipalities could be sued under §1983; and

WHEREAS, in 1980, the Court ruled in Owen v. City of Independence that municipalities did not have any qualified immunity, or good faith defense, to such suits, even though its individual officers and employers have such immunity; and

WHEREAS, as a result of these decisions, which have completely altered the original purpose of the statute when enacted, municipalities throughout the country are being subjected to an onslaught of lawsuits challenging every facet of local government; and

WHEREAS, the continued filing and success of such suits, together with award of attorney's fees pursuant to 42

U.S.C. §1988, imperils the continuing viability and vitality of local governments to carry out their proper role and function; and

WHEREAS, there is a demonstrated need for legislation to amend the statute so as to restore the Act's original purpose and end this threat to local government.

BE IT RESOLVED BY THE COMMISSION OF THE CITY OF LAKELAND, FLORIDA:

SECTION 1. The City Commission of the City of Lakeland does hereby express its support for the concept embodied in S. 584 and S. 585 by Senator Hatch of Utah seeking to amend 42 U.S.C. §1983 so as to make it clear that that statute is intended to be a remedy for true civil rights, or equal rights, violation and that local governments enjoy the same good faith immunity as their officers and employees.

SECTION 2. The City Commission does hereby urge those senators and congressmen in the U.S. Congress from Florida to support this or similar legislation and assist in its passage and becoming law.

SECTION 3. To properly give notice of this position by the City Commission, the appropriate City officials are hereby authorized and directed to transmit copies of this resolution to Senator Hatch, the members of the Florida congressional delegation, and such other persons as may be necessary and proper.

SECTION 4. This Resolution shall take effect immediately upon its passage.

PASSED AND CERTIFIED AS TO PASSAGE this 20th day of April, A.D. 1981.

/s/ R. Larry Turnipseed
Mayor

ATTEST: /s/ Huretta Bassett
City Clerk

APPROVED AS TO FORM AND CORRECTNESS: /s/ David Cardwell
City Attorney

CERTIFICATE OF THE CITY CLERK

STATE OF FLORIDA

COUNTY OF POLK

I, HURETTA BASSETT, HEREBY CERTIFY that I am the regularly and duly appointed City Clerk of the City of Lakeland, Florida, and that the above is a true and correct copy of Resolution No. 2567 which was duly passed by the City Commission of the City of Lakeland at a regular meeting thereof on the 20th day of April, A.D. 1981, which is recorded in Minute Book 26, page approx. 3.

I FURTHER CERTIFY that all of the matters and things necessary for the passage of the said Resolution have been done and performed in accordance with law.

WITNESS my hand and the seal of said City, this the 24th day of April, 1981.

Huretta Bassett

AS City Clerk
of the City of Lakeland, Florida

(SEAL)

RESOLUTION NO. 4
SERIES 1981

At a regular meeting of the City Council of the City of Cortez, Colorado, held at City Council Chambers in the City Hall in Cortez, Colorado, among other matters of business transacted, the following Resolution was proposed and after being put to vote was unanimously adopted, said Resolution being in words as follows, to wit:

BE IT RESOLVED: That the City Council of the City of Cortez unanimously supports S.584 and S.585 introduced by Senator Hatch of Utah. The Council is of the opinion that the Civil Rights Act should be amended to provide a good faith defense for municipalities.

BE IT FURTHER RESOLVED: That Senator Hatch be encouraged to include an amendment to Section 1988 of said Civil Rights Act to the end that availability of attorneys' fees in actions against State and Local Governments be removed.

The City Clerk is directed to send a true and exact copy of this resolution to Senator Hatch as well as to members of Colorado's Congressional Delegation.

DATED THIS 28th DAY OF APRIL, 1981.

THE CITY OF CORTEZ, COLORADO

BY Billy F. Smart
Mayor Billy F. Smart

ATTEST:

Glenn Smith
City Clerk Glenn W. Smith

(S E A L)

CITY OF WICKLIFFE

"COMMUNITY OF OPPORTUNITY"
28730 RIDGE ROAD • WICKLIFFE, OHIO 44092
WILLIAM R. REID, MAYOR
Phone: 944-4000

COUNCIL PRESIDENT
GORDON LEVAR

COUNCILMEN AT LARGE
MARIE HAVERLOCK

ROBERT E. AUFULDISH

COUNCILMEN
MICHAEL W. FITZ - WARD 1

EDWARD C. MATYJA - WARD 2

LEO C. WEBER - WARD 3

THOMAS J. CALEVICH - WARD 4

E.W. MASTRANGELO
DIRECTOR OF LAW

FRANK TOMKO
DIRECTOR OF FINANCE

DARRYL H. CROSSMAN
DIRECTOR OF PUBLIC SERVICE

J. MILFORD JONES
BUILDING COMMISSIONER

ANDREW ZAMBORY
CHIEF OF POLICE

EDWARD BOCHENEK
FIRE CHIEF

H. WILLIAM BENEFELDT
CITY ENGINEER

FRANK L. FITZ
DIRECTOR OF RECREATION

April 29, 1981

Senator Orrin Hatch
Russell Senate Office Building
Washington, D. C. 20510

Dear Senator Hatch:

Please allow me to introduce myself, I am E. W. Mastrangelo, Director of Law for the City of Wickliffe, Ohio. I would like to express my wholehearted support of Senate Bills 584 and 585. It is my understanding that Senate Bill 584 would negate the effects of the Maine vs Thieboutot case, and that Senate Bill 585 would negate the effect of the Owens case, and thus once again extend the defense of good faith to municipalities. I believe that the decisions construing 42 U.S.C. § 1983 have gone far beyond the original intent of Congress in the enactment of § 1983.

The City of Wickliffe is presently involved in a law suit in which the plaintiff has alleged that the City has violated plaintiff's civil rights because the City Council has refused to approve the subdivision of a plot of ground which would place its primary source of ingress and egress at an intersection with a state highway within the City of Wickliffe. This intersection would be at a point where visibility would be seriously hampered. The proposed ingress and egress lies below the crest of a hill and this is the basic objection to the approval of the subdivision. There are other means, at some additional expense, that would be available for the developers to make the ingress and egress safer for persons who have to use it.

Because of said denial by the City Council of the City, the individual councilmen are now parties to a claim for damages under § 1983. The situation is even more difficult when you realize that there has been no official policy adopted by the City, other than the individual action of the members of Council. Fortunately, the members of Council may still assert a good faith defense, however, the entity, in this case the City of Wickliffe, because of the Owens case no longer has available to it a good faith defense.

The matter is further complicated by the fact that a public official liability insurance policy was available at the time the claim was made, but it only extended coverage to the individual officials and not the entity, so we have the additional unusual situation where the councilmen are protected by insurance coverage, but the City is without said coverage and also without the defense of good faith.

The Mayor, the Council and myself urge you to support Senate Bills 584 and 585 in order to restore a certain amount of security to municipalities, and allow a municipality to properly exercise the powers of home rule for the health and safety of the inhabitants of their respective municipalities.

Very truly yours,

CITY OF WICKLIFFE

E. W. Mastrangelo
Director of Law

EWM:at

CITY
OF
ST. PETERSBURG
OFFICE OF THE MAYOR AND COUNCIL

April 29, 1981

The Honorable Orren G. Hatch
United States Senator
411R State Office Building
Washington, DC

Dear Senator Hatch:

I understand that during the month of May the Senate Subcommittee on the Constitution will be considering proposed amendments to Section 1983 of the U.S. Code on Civil Rights. I strongly support the amendments embodied in SB 585 and 584 and I urge the subcommittee to consider further amendments to Section 1983.

The broad language of Section 1983 and the recent constructions of that language by the federal courts unfortunately have lead to abuses which are an affront to those who originated the legislation. A statute which was originally intended to protect citizens from abuses of governmental power has become a tool whereby all levels of government are harrassed and intimidated by the threat of federal civil liability and government employees are forced to undergo the ordeal of federal lawsuits and face the threat of personal liability as a result of many unjustified claims of governmental wrongdoing.

Our City Attorney and his staff are currently defending our City and its employees in nine lawsuits involving allegations of deprivations of civil rights under Section 1983. These lawsuits are founded upon claims ranging from alleged false arrests by municipal police officers to challenges to our efforts to regulate land use and storm drainage in our community. The number of such suits and the variety of subject matter with which they deal increases yearly.

These lawsuits are costly in financial terms and in terms of their effects upon the governmental employees and officials involved. For example, as a result of one recent Section 1983 lawsuit in the Federal Court for the Middle District of Florida, two of our police officers were found not guilty of violating the civil rights of a man and his wife who were arrested as a result of their attacks upon the officers while the officers were attempting to investigate a dispute involving the couple and their neighbors. These officers, each of whom are veterans of over seven years of unblemished police service, lived with the

COUNCIL – MANAGER GOVERNMENT
P.O. BOX 2842 • ST. PETERSBURG, FLORIDA 33731 • (813) 893-7117

threat of personal liability for punitive damages sought in this lawsuit for over two years and underwent the ordeal of four days of trial in the federal court. Although the jury ultimately vindicated their actions, they and their families will never forget their experience, which has caused them to express serious misgivings about their choice of a career in law enforcement and their ability to function effectively in that profession.

The total cost of the defense of this one lawsuit was approximately $4,500. After the trial, the federal judge dejectedly lamented to the attorney for the policemen that he would begin another "even weaker" Section 1983 trial the next day.

In another Section 1983 action, all seven members of our City Council along with the former City Manager and a lower level supervisor have been named as Defendants and are alleged to have violated a local developer's civil rights by depriving him of the "lawful" use of his property through the enactment of an ordinance requiring that he obtain permits for the removal of trees from his property. It now appears that our physical presence will be required for the three week trial of this case in June. The hardship upon all of us, and especially those with private business concerns, will be enormous.

In addition, the subject matter of these lawsuits often simply does not appear to rise to a level of importance which would warrant attention by the federal courts. For instance, our City is involved in a Section 1983 action which alleges that the City channeled storm water runoff into a private canal. Surely adequate state remedies are available to address this matter without involving the federal courts.

In view of the proliferation of litigation under Section 1983 in cases involving factual circumstances far beyond those envisioned by those who originated the statute, amendments reflecting a balance between individual civil rights and the need for effective government are essential. We in local government are relying upon you to be responsive to the need for change.

Respectfully,

Corinne Freeman

CORINNE FREEMAN
Mayor

CF:plm

City of Gering

1450 10th Street
Gering, Nebraska 69341
(308) 436-5096

Mayor

John A. McLellan Jr.

Council

Lawrence C. Gibbs
Bill L. Hessler
Leo M. Temple
Guy I. Gibb
I. Leo Winterer
Norman E. DeMott
Thomas G. Crokie
Sherry A. Blaha

City Administrator

Michael E. Solomon

City Clerk - Treasurer

Robert L. Stull

May 4, 1981

The Honorable James J. Exon
United States Senator
4327 Dirksen Senate Office Bldg.
Washington, D.C. 20510

The Honorable Virginia Smith
United States Congresswoman
1005 Longworth Bldg.
Washington, D.C. 20510

The Honorable Edward Zorinsky
United States Senator
Suite 432
Russel Bldg.
Washington, D.C. 20510

RE: PUBLIC OFFICIALS LIABILITY

Dear Fellow Nebraskans:

I am writing to you to urge you to support current efforts of the National League of Cities supporting legislation that would limit personal and official liabilities of municipal officials. Recent court decisions have actually expanded the realm of liability of municipal officials and have, in effect, made it easier for municipal officials to be sued, even to an extent that personal possessions are threatened.

Gering City officials remain opposed to this trend and urge your support in alleviating the situation. I do not need to tell you, as an elected official, that the desire for personal wealth is certainly not the motivating factor for seeking elective office. More accurately, the desire to serve your constituency for the betterment of our governmental system remains as the cornerstone of public service. However, the continuation of a trend of legal decisions that penalizes and threatens that desire to serve can only result in the loss of qualified people in our public sector.

A copy of a recent letter to Nebraska State Senator Bill Nichol accurately reflects the feelings of the Gering City Council. In closing, I would like to again ask your support, on the national level, for any legislation which will permit the dedicated service of our local, state and national officials to continue at the high level of service now in existence.

Sincerely,

John McLellan, Jr.

John A. McLellan, Jr.
Mayor

JAM/lb

xc: Senator Orrin Hatch, Chairman
Sub-Committee of the Senate Judiciary Committee

City of Norfolk

127 North 1st Street
P.O. Box 209
Norfolk, Nebraska 68701

May 4, 1981

The Honorable James J. Exon
United States Senator
4327 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Exon:

The National League of Cities and the National Institute of Municipal Law Officers have made enactment of legislation defining and limiting municipal liability for violation of 42 United States Code Section 1983 (Civil Rights Acts of 1871) a top priority for 1981.

Proposals to limit municipal liability were developed in response to recent decisions of the U.S. Supreme Court which substantially broadened the scope of liability beyond the original intent of the act:

Before 1978: Only individual officers and employees of municipal governments could be liable under Section 1983; however, they were frequently protected from liability by personal immunities and defenses of good faith, legislative immunity, or qualified immunity.

1978: In Monell v. Department of Social Services, the U.S. Supreme Court held that municipal government could also be liable for monetary, injunctive, and declaratory relief under "Section 1983" whenever official governmental policies or practices violated constitutional rights.

1980: In Owen v. City of Independence, the U.S. Supreme Court held that the "good faith defense" is not applicable to municipalities. Consequently, a municipality may now be liable regardless of the reasonableness of its belief that the action was legal.

1980: In Maine v. Thiboutot, the U.S. Supreme Court substantially extended the coverage of Section 1983 by holding that Section 1983 was not just limited to violations of constitutional rights; in Thiboutot, the Court held that Section 1983 included violations of all federal statutes. Thus, plaintiffs may now sue local governments whenever their policies or practices violate any federal law. In essence, state and local officials could find themselves defending

> actions of the federal government in joint local-federal programs since NO similar recovery procedures exist against federal officials.

The Supreme Court's opinions have come at the time when municipalities can least afford the possibility of additional financial burdens.

The Senate Judiciary Committee's Sub-Committee on the Constitution will begin hearings on the Section 1983 issue on May 6. On behalf of the Mayor and City Council, I urge you to support efforts underway to limit municipal liability and restore the law to its original purpose - the protection of fundamental constitutional rights.

Sincerely,
CITY OF NORFOLK

Michael Nolan
Michael Nolan
City Administrator

cc: Nebraska League of Municipalities
Norfolk Chamber of Commerce
✓U.S. Senator Orin Hatch
Mayor and City Council

OFFICE OF THE MAYOR
SHREVEPORT, LOUISIANA

W. T. HANNA, JR.
MAYOR

May 4, 1981

The Honorable Orrin G. Hatch, Chairman
Sub-Committee on the Constitution
Senate Judiciary Committee
Washington, D.C. 20510

RE: S 584 and S 585

Dear Senator Hatch:

I want to express my appreciation for and endorsement of your efforts to have S 584 and S 585 enacted into law by the United States Congress.

As I am sure you know, virtually all municipal governments are severely impacted by the economic conditions under which we have all had to live for the past several years. Although inflation probably has no greater effect on expenses of municipal government than it does on any other level of government or, for that matter, private industry, we have much less ability to adjust our revenues to inflation than do other levels of government and the private sector.

No aspect of our city government has increased in cost over the past several years more than has the expense we have incurred in the defending lawsuits. We feel this to be true for at least two reasons. First, as we can all see, American society in general is becoming more litigious. Secondly, lawsuits against states and local governmental subdivisions thereof are particularly on the rise. No better example of this can be cited than the virtual explosion in litigation under 42 U.S.C. 1983.

Our city attorney advises me that decisions of the United States Supreme Court have greatly expanded the scope of causes of action arising under 42 U.S.C 1983 far beyond what could have possibly been the intention of the Congress that enacted this statutory authority into law.

As I appreciate it, S 584 would effectively overrule Maine v. Thiboutot, 65 L.Ed 2d 555 (1980) by limiting the federal "laws" whose violation triggers a §1983 cause of action to laws "providing for equal rights of citizens or of all persons within the United States." S 585 would afford states and local governmental subdivisions thereof a defense where they "acted in good faith with a reasonable belief that the actions of the political subdivision were not in violation of any rights, privileges, or immunities secured by the Constitution or by the laws providing for equal rights of citizens or persons." We wholeheartedly support both concepts and appreciate your efforts to legislate a return to more equitable basis for §1983 causes of action. We feel that your legislation, if enacted into law, will restore the original intent of Congress when §1983 was adopted. Plaintiffs who have had their civil rights abridged by governmental officials acting in bad faith will be provided a means for recovery. However, states and local governmental subdivisions will not find their increasingly scarce resources diverted from providing essential services to its citizens to litigating frivilous lawsuits and paying judgments in causes of action never intended by the United States Congress.

Under separate cover I am transmitting copies hereof to Senators Long and Johnston and requesting that they do everything they can to be of assistance to you in the passage of this legislation.

Yours truly,

W. T. Hanna, Jr.

W. T. Hanna, Jr.
MAYOR

WTH,Jr:cm

RESOLUTION NO. 515

A RESOLUTION SUPPORTING THE AMENDMENT OF THE CIVIL RIGHTS ACT OF 1871 AND THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976, 42 U.S.C. §§ 1983 AND 1988

WHEREAS, the 1600 local governments which are members of the National Institute of Municipal Law Officers and which participate in the work of NIMLO through their chief legal officers are concerned that the Civil Rights Act of 1871 as construed in recent decisions by the Supreme Court of the United States will adversely affect all local governments in ways which were not brought to the attention of the Court in recent cases and which are only now becoming apparent;

WHEREAS, NIMLO in surveying its members has determined that claims under the Civil Rights Act, 42 U.S.C. §1983, now pending, amount to $4 billion for 199 local governments, in some cases the civil rights claims exceeding the operating budgets of smaller municipalities;

WHEREAS, the easy availability of attorney's fees in §1983 cases encourages the filing of frivolous claims of this magnitude;

WHEREAS, excessive judicial intrusion caused by the strict liability concepts of the referred to Supreme Court decisions compounded by attorney fee availability will distort municipal decisionmaking and restrict the independence of local governments and their ability to respond to community needs;

WHEREAS, a special committee of municipal attorneys has considered the problem and the needed legislative solution; and

WHEREAS, the Town of Normal has been a party to §1983 lawsuits which have been based on frivolous fact situations and the defense of these lawsuits has cost the taxpayers many thousands of dollars.

NOW THEREFORE BE IT RESOLVED that the Town Council of the Town of Normal urges the Committees on the Judiciary of the House and the Senate to give early and careful consideration to the bill appended to the report of the municipal attorneys, and to the supporting reasons set out in the report itself, and further urges that the Committees consider data illustrative of the civil rights litigation problem now facing local governments, data of the kind mentioned in the attorney's report.

BE IT FURTHER RESOLVED that the Town Clerk be and she is directed to send a certified copy of this resolution to the Honorable Edward R. Madigan, Charles H. Percy, Alan J. Dixon and to the National Institute of Municipal Law Officers.

Adopted this 4th day of May, 1981.

APPROVED:

President of the Board of Trustees of the Town of Normal, Illinois

ATTEST:

Town Clerk

STATE OF ILLINOIS,
County of McLean, } *SS.*
Town of Normal

I, Marianne Edwards *Town Clerk of said Town, do hereby certify that the foregoing is a true and complete copy of an original* Resolution No. 515 *presented, passed and approved at a regular meeting of said Town Council held on the* Fourth *day of* May*, 19*81*, by an affirmative vote of the majority of all members elected to said Council, the vote having been taken by yeas and nays and entered on the record of the proceedings of said Council.*

Witness my hand and seal of said Town of Normal, this Seventh *day of* May*,*
A.D., 19 81.

Marianne Edwards
Town Clerk.

CITY OF RALSTON
RALSTON, NEBRASKA 68127
331-6677

May 5, 1981

Orrin Hatch, Chairman of the Sub-Committee
of the Senate Judiciary Committee
104 A
Russel Senate Office Bldg.
Washington, D.C. 20510

Dear Chairman Hatch:

The City of Ralston urges you to support the efforts underway by the National League of Cities to limit personal and official liability of municipal officials in order to restore the law to its original purpose- the protection of fundamental constitutional rights; the above pertaining to United States Code Section, 1983, (Civil Rights Act of 1871.)

Yours very truly,

Joseph Wager

Joseph Wager
Mayor

JW/cj

"THE FIRST ALL-NEBRASKA COMMUNITY"

CITY OF PARMA OHIO
OFFICE OF THE COUNCIL

President of Council
KENNETH G. KUCZMA

Ward 1 VICTOR J. LABUTTA
Ward 2 FRANK J. HOUDEK, President Pro Tem
Ward 3 JACK C. KRISE, Jr.
Ward 4 JOSEPH A. MOLODEC
Ward 5 EVELYN M. KOPCHAK
Ward 6 GERALD M. BOLDT, Majority Leader
Ward 7 EDWARD LONJAK
Ward 8 DORIS P. KRAWCZYK
Ward 9 WILLIAM R. OBUCH

Clerk of Council BERNARD J. SURVOY

6611 RIDGE ROAD
886-2323
PARMA, OHIO 44129

May 5, 1981

The Honorable Senator Orrin Hatch, Chairman
Subcommittee on the Constitution of the Senate Judiciary Committee
Senate Office Building
Washington, D.C. 20510

My dear Senator Hatch:

Enclosed is copy of Resolution No. 101-81, urging the Congress of the United States to support the passage of Senate Bill 584 and Senate Bill 585, and to amend the Civil Rights Attorney's Fees Awards Act of 1976 for reasons stated in the report to Congress by the Municipal Attorneys Defending Section 1983 Cases, passed by Parma City Council on May 4, 1981.

Very truly yours,

Bernard J. Survoy

Bernard J. Survoy
Clerk of Council
City of Parma, Ohio

BJS:msb

Encl. 1

5/4/81 L-102 gw

RESOLUTION NO. 101-81

BY: GERALD BOLDT, FRANK HOUDEK, EVELYN KOPCHAK, DORIS KRAWCZYK, JACK KRISE, VICTOR LABUTTA, EDWARD LONJAK, JOSEPH MOLODEC, WILLIAM OBUCH

A RESOLUTION URGING THE CONGRESS OF THE UNITED STATES TO SUPPORT THE PASSAGE OF SENATE BILL 584 AND SENATE BILL 585, AND TO AMEND THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 FOR REASONS STATED IN THE REPORT TO CONGRESS BY THE MUNICIPAL ATTORNEYS DEFENDING SECTION 1983 CASES

WHEREAS, the City of Parma and other local governments throughout the United States are concerned that the Civil Rights Act of 1871 as construed in recent decisions by the Supreme Court of the United States will adversely affect Parma and other local governments in ways which were not brought to the attention of the Court in recent cases and which are only now becoming apparent; and

WHEREAS, a survey recently made discloses that claims under the Civil Rights Act, 42 U.S.C. §1983, now pending, amount to four billion dollars ($4 billion) for 199 local governments, in some cases the civil rights claim exceeding the operating budgets of smaller municipalities; and

WHEREAS, a prime example is the recent verdict against the City of Stow, Ohio, in the amount of five million dollars ($5,000,000) offset by a $1,000,000 maximum insurance coverage, with the City having a 1981 operating budget of three million nine hundred thousand dollars ($3,900,000); and

WHEREAS, Senate Bill 584 would limit the federal "laws" whose violation would trigger a §1983 Civil Rights Action;and

WHEREAS, Senate Bill 585 would bar an action against a local government which "acted in good faith with a reasonable belief that the actions of the political subdivision were not in violation of any rights, privileges, or immunities secured by the Constitution or by laws providing for equal rights of citizens and persons"; and

WHEREAS, this Council and Administration urges support of the report submitted to Congress entitled "Amendments to the Civil Rights Act of 1871 and the Civil Rights Attorney's Fees Award Act of 1976: A Report to the Congress by Municipal Attorneys Defending Section 1983 Cases", prepared and submitted to Congress by a municipal attorneys committee of the National Institute of Municipal Law Officers (NIMLO), in support of Senate Bill 584 and Senate Bill 585, and an amendment to the Civil Rights Attorney's Fees Awards Act of 1976;

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF PARMA, STATE OF OHIO:

Section 1. That this entire Council, its President Kenneth G. Kuczma, and the Administration, Mayor John Petruska, Auditor Joseph S. Lime, Law Director Andrew Boyko, and Treasurer Joseph Gatz, support the report of NIMLO submitted to the Congress of the United States, the adoption of Senate Bill 584 and Senate Bill 585, and the amendment to the Civil Rights Attorney's Fees Award Act of 1976.

Section 2. That the Clerk of Council is hereby directed to transmit copies of this Resolution to the Committee of Municipal Attorneys, NIMLO, 1000 Connecticut Avenue, N.W., Suite 800, Washington, D.C. 20036, United States Senators John H. Glenn and Howard M. Metzenbaum, Congressmen Ronald M. Mottl, Mary Rose Oakar and Dennis Eckart, and Senator Orrin Hatch, Chairman of the Subcommittee on the Constitution of the Senate Judiciary Committee.

Pg. 2 of L-102 Res. supporting the passage of S.B. 584 and 585

Section 3. That this Resolution is hereby declared to be an emergency measure necessary for the immediate preservation of the public health, safety and welfare of the City of Parma, and for the further reason that Committee hearings on Senate Bill 584 and Senate Bill 585 will be held on or before May 6, 1981, and this Resolution in support of the amendments should be before the Committee upon consideration of Senate Bill 584 and Senate Bill 585, and this Resolution shall become immediately effective upon receiving the affirmative vote of two-thirds of all members elected to Council and approval of the Mayor, otherwise from and after the earliest period allowed by law.

PASSED: May 4, 1981

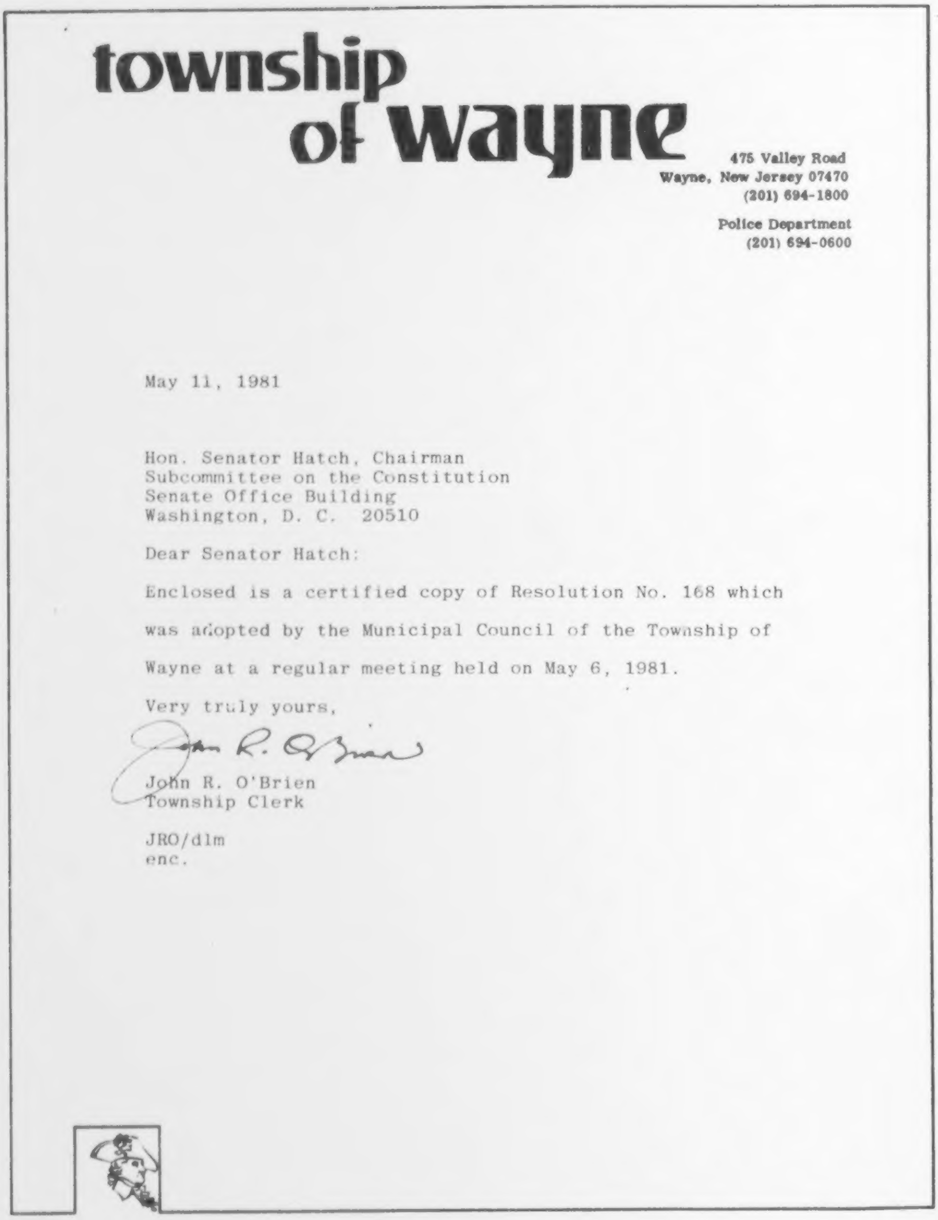
/s/ Kenneth G. Kuczma
PRESIDENT OF COUNCIL

ATTEST: /s/ Bernard J. Survoy
CLERK OF COUNCIL

APPROVED: May 4, 1981

FILED WITH
THE MAYOR: May 4, 1981

/s/ John Petruska
MAYOR, CITY OF PARMA, OHIO



township
of wayne

475 Valley Road
Wayne, New Jersey 07470
(201) 694-1800

Police Department
(201) 694-0600

May 11, 1981

Hon. Senator Hatch, Chairman
Subcommittee on the Constitution
Senate Office Building
Washington, D. C. 20510

Dear Senator Hatch:

Enclosed is a certified copy of Resolution No. 168 which was adopted by the Municipal Council of the Township of Wayne at a regular meeting held on May 6, 1981.

Very truly yours,

John R. O'Brien

John R. O'Brien
Township Clerk

JRO/dlm
enc.

TOWNSHIP OF WAYNE
COUNTY OF PASSAIC
STATE OF NEW JERSEY
[illegible]
RESOLUTION NO. 168

A motion was made by Robert Pasca seconded by Joyce Amabile that the following resolution be adopted:

SUPPORT OF SENATE BILLS #584-#585

WHEREAS, recent decisions of the United States Supreme Court construing provisions of the Civil Rights Act of 1871 have caused 42 USC Sec. 1983 to become the vehicle for assertion of claims against municipalities in areas having no relationship with traditional civil rights matters while denying municipalities many defenses thereto; and

WHEREAS, the Civil Rights Attorneys' Fees Awards Act of 1976 (42 USC Sec. 1988) provides for a discretionary award of attorneys' fees to prevailing parties in Sec. 1983 cases; and

WHEREAS, several billion dollars in claims under Sec. 1983 are now pending against municipal governments; and

WHEREAS, such claims are not covered by insurance; and

WHEREAS, Sec. 1983 lawsuits have a potentially crippling financial impact upon municipal governments; and

WHEREAS, the Subcommittee of the Senate Judiciary Committee has held hearings on amendments to Sec. 1983; and

WHEREAS, Senate Bill 584 would limit Sec. 1983 actions solely to actions "providing for equal rights of citizens or of all persons within the United States;" and

WHEREAS Senate Bill 585 would bar actions against local governments acting in good faith; and

WHEREAS, the National Institute of Municipal Law Officers supports statutes limiting the award of attorneys' fees in civil rights actions, limiting Sec. 1983 actions to civil rights violations; and providing good faith immunity to local governments; and

WHEREAS, Senate Bill 990 would expand local government liability by making local governments strictly liable in Sec. 1983 actions for equitable relief;

NOW, THEREFORE, BE IT RESOLVED that the Municipal Council of the Township of Wayne hereby urges the Subcommittee on the Constitution Senate Judiciary Committee to support amendments to the Civil Rights 1871 and to the Civil Rights Attorneys' Fees Awards Act of 1976 limit Sec. 1983 actions to cases of civil rights violations, providing immu for civil rights cases to local governments acting in good faith, and limiting awards of attorneys' fees in civil rights actions; and

BE IT FURTHER RESOLVED that the Municipal Council urges the Subcommittee on the Constitution to oppose Senate Bill 9[illegible] and any other [illegible] cases afforded local government in equitable actions; and

BE IT FURTHER RESOLVED that a copy of this resolution be sent to Hatch, Chairman of the Subcommittee on the Constitution, to the United States Senators for the State of New Jersey, to the United States Congressional delegation for New Jersey, and to Passaic County municipal

ROLL CALL:

AYES: Joyce Amabile, Frederick [illegible]auer, Joseph DiDonato, [illegible], Robert Pacca, Bert Tucker, David Waks, Gary Webb, William H.

NAYS: None

THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE AND EXACT COPY OF A RESOLUTION ADOPTED BY THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF WAYNE AT A REGULAR MEETING HELD ON MAY 6, 1981

John R. O'Brien

JOHN R. O'BRIEN
TOWNSHIP CLERK

City of Sterling Heights
40555 Utica Road
Sterling Heights, Michigan 48078

MAYOR
Anthony Dobry

MAYOR PRO-TEM
José G. Benavides

COUNCIL
Leo G. Backes
Bowman K. Chung
Jerry V. Mann
Stanley E. Rainko
Nancy L. Ulrich

May 11, 1981

The Honorable Orrin Hatch
State Capitol Building
Washington, D.C. 20510

Dear Senator Hatch:

The City Council of the City of Sterling Heights took action at their meeting of Tuesday, May 5, 1981, to adopt the enclosed resolution supporting legislation which would balance the protection of legitimate civil rights and legitimate actions of governments.

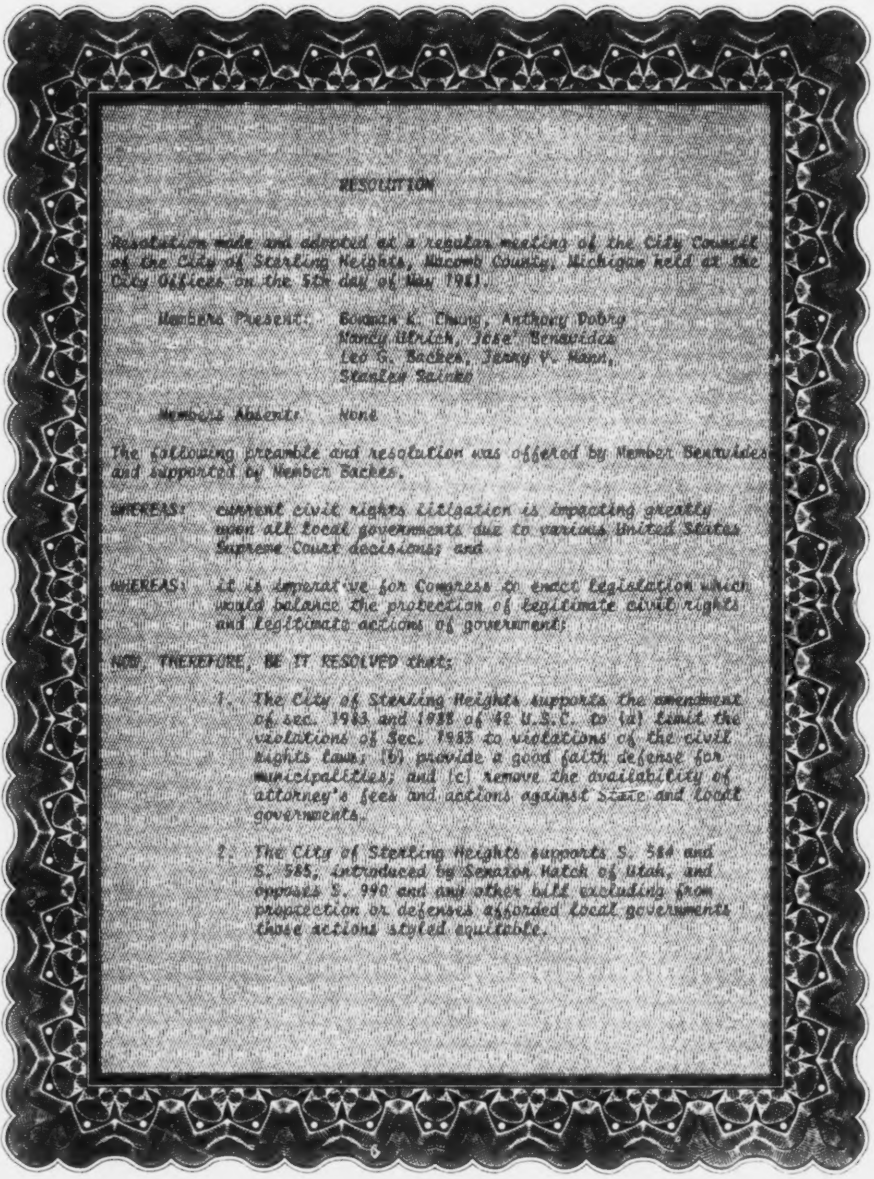
Sincerely,

Mary T. Zander
Mrs. Mary T. Zander, CMC
City Clerk

MTZ/lr

Enclosure

Office of the City Clerk
313/977-6134



RESOLUTION

Resolution made and adopted at a regular meeting of the City Council of the City of Sterling Heights, Macomb County, Michigan held at the City Offices on the 5th day of May 1981.

Members Present: Bowman K. Chung, Anthony Dobry
Nancy Ulrich, Jose' Benavides
Leo G. Backes, Jerry V. Mann,
Stanley Sainko

Members Absent: None

The following preamble and resolution was offered by Member Benavides and supported by Member Backes.

WHEREAS: current civil rights litigation is impacting greatly upon all local governments due to various United States Supreme Court decisions; and

WHEREAS: it is imperative for Congress to enact legislation which would balance the protection of legitimate civil rights and legitimate actions of government;

NOW, THEREFORE, BE IT RESOLVED that;

1. The City of Sterling Heights supports the amendment of sec. 1983 and 1988 of 42 U.S.C. to (a) limit the violations of Sec. 1983 to violations of the civil rights laws; (b) provide a good faith defense for municipalities; and (c) remove the availability of attorney's fees and actions against State and local governments.

2. The City of Sterling Heights supports S. 584 and S. 585, introduced by Senator Hatch of Utah, and opposes S. 990 and any other bill excluding from proptection or defenses afforded local governments those actions styled equitable.

© GOES 765

LITHO IN U.S.A.

3. The City of Sterling Heights further supports the bill attached to the report of the Metro Committee of Municipal Attorneys and urges enactment of said legislation.

4. Copies of this Resolution shall be sent to Senators [illegible], Riegle, Levin and [illegible], and also to Congressmen Blanchard, Bonior, and [illegible].

Dated at the City of Sterling Heights this 5th day of May 1981.

Resolution declared and adopted.

CERTIFICATION

I hereby certify that the foregoing is a true and correct copy of a resolution made and adopted by the City Council of Sterling Heights at its regular meeting held on the 5th day of May, 1981.

Mary [illegible], CMC
City Clerk

AFSCME®
American Federation of State, County and Municipal Employees
1625 L Street, N.W., Washington, D.C. 20036
Telephone (202) 452-4800
Telex 89-2376

May 12, 1981

Jerry Wurf
President
William Lucy
Secretary-Treasurer

Vice Presidents
Bob Anderson
Jefferson City, Mo.
Dominic J. Badolato
Berlin, Conn.
Rev. Albert B. Blatz
St. Peter, Minn.
Joseph Bolt
Richmond, Ind.
Joseph M. Bonavita
Boston, Mass.
Robert A. Brindza
Columbus, Ohio
Ernest B. Crofoot
Baltimore, Md.
Steve Culen
Springfield, Ill.
Albert A. Diop
New York, N.Y.
T. J. Fitzpatrick
Ft. Lauderdale, Fla.
Thomas G. Gerber, Sr.
Eau Claire, Wisc.
Victor Gotbaum
New York, N.Y.
Bob Johnson
Garden City, Mich.
George Masten
Olympia, Wash.
Joseph E. McDermott
Albany, N.Y.
Gerald W. McEntee
Harrisburg, Pa.
Georgia M. McGhee
Grand Rapids, Mich.
William L. McGowan
Albany, N.Y.
Jack Merkel
Trenton, N.J.
Richard P. Morton
New York, N.Y.
T. J. Ray
Baton Rouge, La.
John Seferian
Manhattan Beach, Calif.
Earl Stout
Philadelphia, Pa.
David K. Trask, Jr.
Honolulu, Hawaii
Maynard White
Houston, Texas

The Honorable Orrin Hatch, Chairman
Senate Judiciary Subcommittee
  on the Constitution
United States Senate
Washington, D.C. 20510

Dear Chairman Hatch:

On May 6 and May 7, the Senate Judiciary Subcommittee on the Constitution held hearings on S. 584 and S. 585, which limit local government liability for violations of federal Constitutional and Statutory Rights under the Civil Rights Act of 1971 (42 USC 1983). The American Federation of State, County and Municipal Employees (AFSCME), which represents more than one million public employees nationwide, opposes the proposed limitations which will restrict the availability of the full protection of our laws and the Constitution.

From the post-Civil War reconstruction era to the present, section 1983 has provided a statutory remedy for individuals whose Constitutional and civil rights have been violated by those acting under the color of state law. By allowing individuals to maintain a private cause of action to enforce their federal statutory rights, section 1983 embodies procedural mechanisms to obtain judicial relief.

However, S. 584 and S. 585 would tremendously weaken existing law. S. 584 would deny private enforcement of various federal statutes, regardless of how intentional the violation of federal law may have been. Such a limitation results in immunizing illegal actions of state and local government. S. 585, by providing political subdivisions with a "good faith" defense, would negate the established legal principle that local governments should be liable to persons whose rights they violate.

AFSCME has long supported the positive development of civil and Constitutional rights for all Americans. We believe that local governments have a unique responsibility for their actions. We, therefore, urge you to oppose S. 584 and S. 585. We request the insertion of our letter as part of the official record.

Sincerely,

JOSIAH BEEMAN
Director of Legislation

JB:cz

RESOLUTION NO. 174

A RESOLUTION SUPPORTING CONGRESSIONAL ACTION TO PROVIDE A GOOD FAITH DEFENSE FOR MUNICIPALITIES AND TO REMOVE THE AVAILABILITY OF ATTORNEY'S FEES IN ACTIONS AGAINST STATE AND LOCAL GOVERNMENTS PURSUANT TO 42 USC SECTION 1983 REGARDING CIVIL RIGHTS LAWSUITS

WHEREAS, the City of Golden has recently been involved in litigation in Federal District Court regarding civil rights lawsuits brought against the City pursuant to 42 USC Section 1983; and

WHEREAS, as a result of recent United States Supreme Court decisions, the traditional "good faith" defense for municipalities in defending a civil rights lawsuit has been removed which has subjected all municipalities to extremely burdensome damage and attorney's fee award liability; and

WHEREAS, the National Institute of Municipal Law Officers (NIMLO) has made a priority item congressional action to restore the good faith defense and to remove the applicability of attorney's fees awards in civil rights litigation, of which the City of Golden fully supports.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF GOLDEN, COLORADO:

Section 1. The City Council of the City of Golden fully supports the NIMLO resolution passed by the NIMLO annual conference in New York City in November, 1980 calling for the amendment of Sections 42 USC 1983 and 1988 to accomplish the following:

(a) Limit the violations of Section 1983 to violations of the civil rights laws;

(b) Provide a good faith defense for municipalities; and

(c) Remove the availability of attorney's fees in actions against state and local governments.

Section 2. The City Council of the City of Golden fully supports congressional action to implement the aforementioned NIMLO resolution and in this regard fully supports current United States Senate Bills 584 and 585 and any other congressional action which would fully implement the NIMLO resolution as aforementioned.

Section 3. The City Clerk is directed to provide certified copies of this resolution to the Colorado Congressional delegation and NIMLO.

Adopted this 14th day of May, 1981.

Frank I Leek
Frank I. Leek, Mayor

ATTEST:

Sharon L. Bennetts
Sharon L. Bennetts, City Clerk

Approved as to form

[illegible], City Attorney

Resolution No. 174, Con't.

I, Sharon L. Bennetts, City Clerk of the City of Golden, Colorado, do hereby certify that the foregoing is a true and correct copy of a certain Resolution adopted by the City Council of the City of Golden, Colorado, on the 14th day of May, 1981.

(SEAL)

Attest: Sharon L. Bennetts
Sharon L. Bennetts
City Clerk

CITY OF MITCHELL
Mitchell, Nebraska 69357

May 19, 1981

The Honorable Edward Zorinsky
United States Senator
Suite 432
Russel Building
Washington, D.C. 20510

Senator Zorinsky:

We want to urge you to support the efforts underway to limit municipal liability and restore the law to its original purpose--the protection of fundamental constitutional rights.

Sincerely,

George Flaherty
George Flaherty, Mayor

Leo Johnston, President of
Council

James E. Hanson
James Hanson, Councilman

Paul Stewart
Paul Stewart, Councilman

Russ Weimer
Russell Weimer, Councilman

cc: Orrin Hatch

RONALD J. DE LAIN
COUNTY CLERK

NORTHERN BLDG., 4th FLOOR
305 E. WALNUT STREET
GREEN BAY, WISCONSIN 54301
PHONE: (414) 497-3231

STATE OF WISCONSIN)
)
COUNTY OF BROWN)

I, Ronald J. De Lain, County Clerk of the County of Brown, Wisconsin, do hereby certify that the attached is a true and correct copy of resolution number 39, adopted by the Brown County Board of Supervisors on May 20, 1981, and approved by Donald J. Holloway, County Executive.

Ronald J. De Lain
County Clerk, Brown County, Wisconsin

Subscribed and sworn to before
me this 26th day of
May, 1981.

Mardell Grupch
NOTARY PUBLIC, BROWN COUNTY, WIS.
My commission expires: 6-3-84

May 20, 1981

TO THE HONORABLE CHAIRMAN AND MEMBERS
OF THE BROWN COUNTY BOARD OF SUPERVISORS

Ladies and Gentlemen:

RESOLUTION IN SUPPORT OF FEDERAL LEGISLATION AMENDING THE CIVIL RIGHTS ACT OF 1871

WHEREAS, recent decisions of the Supreme Court of the United States construing the application of the Civil Rights Act of 1871 to local governments will adversely affect local governments in ways which were not brought to the attention of the Court; and

WHEREAS, Senate Bills 584 and 585 have been introduced in the Congress of the United States, which legislation would provide limitations on certain civil rights actions against local governments now judicially recognized; and

WHEREAS, Senate Bill 584 would limit federal laws whose violation allows a cause of action to be brought under 42 U.S.C., Section 1983 to only those federal laws providing for equal rights of citizens or of all persons within the United States; and

WHEREAS, Senate Bill 585 would bar an action brought under 42 U.S.C., Section 1983 against a local government which has acted in good faith with a reasonable belief that the actions of the political subdivision were not in violation of any rights, privileges, or immunities secured by the United States Constitution or by laws providing for equal rights of citizens or persons.

NOW, THEREFORE, BE IT RESOLVED by the Brown County Board of Supervisors that it hereby expresses its support for the concepts contained in Senate Bills 584 and 585 and urges their adoption into law by the Congress of the United States; and

FURTHER, BE IT RESOLVED that a copy of this resolution be sent to the Wisconsin members of the United Senate, William Proxmire and Robert Kasten, and to United States Representative Toby Roth and to Senator Hatch, Chairman of the Subcommittee on the Constitution of the Senate Judiciary Committee.

Respectfully submitted,

Michael J. Melotte

Jeffrey

Approved By:

Lou Holloway

COUNTY EXECUTIVE

LEGISLATIVE COMMITTEE

STATE OF ILLINOIS)
COUNTY OF COOK) SS

I, VIRGINIA R. CASSIN, Village Clerk of the Village of Oak Park, in the County of Cook and State of Illinois do hereby certify that the annexed and foregoing is a true and correct copy of that certain RESOLUTION now on file in my office entitled

RESOLUTION SUPPORTING SENATE BILLS 584 & 585

which said RESOLUTION was passed by the Board of Trustees of the Village of Oak Park at a session held on 18th day of MAY A.D. 1981, and approved by the President of the Village of Oak Park on the 18th day of MAY, 1981.

I further certify that the vote on the question of the passage of the said RESOLUTION by the Board of Trustees of the Village of Oak Park was taken by ayes and nays and recorded in the Journal of the Proceedings of the Board of Trustees of the Village of Oak Park and that the result of said vote was as follows, to-wit:

Ayes - - - Trustees: Kier, Korchek, McLean, McMahon, Muriello and Slaughter and President Bode
Nays - - - None
Absent - - None

I do further certify that the Original RESOLUTION, of which the foregoing is a true copy, is entrusted to my care for safekeeping, and that I am the lawful keeper of the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said Village of Oak Park this 22nd day of MAY, A.D. 1981.

Virginia R. Cassin
Village Clerk, Village of Oak Park
I. Rosmarie Shaw
by: I. Rosmarie Shaw
Deputy Village Clerk

ACT:kd 5/7/81

RESOLUTION SUPPORTING SENATE BILLS 584 & 585

BE IT RESOLVED by the President and Board of Trustees of the Village of Oak Park, Cook County, Illinois, as follows:

SECTION 1: The Board of Trustees finds:

A. That United States Supreme Court decisions have expanded the liability of the Village under Section 1983 of Chapter 42 of the United States Code so that liability no longer need be related to deprivation of civil rights, and so that the good faith of the community is no longer a defense.

B. Many decisions of the President and Board of Trustees of the Village have a constitutional impact on citizens that cannot be avoided regardless of the good faith efforts of the governing body. A zoning decision to deny rezoning subjects the municipality to a constitutional deprivation claim under Section 1983 by the property owner aggrieved. A decision to allow the same change in zoning may subject the municipality to a constitutional claim of deprivation by an adjoining property owner. The Village has been advised by its Counsel that it is impossible to predict which actions may be sustained by the Courts. In any event, the municipality is faced with the expense of the litigation, damage claims and claims for attorney's fees no matter which way the decision is made.

C. As our society has become more and more complex, the problems of local government are expanding at an ever increasing rate without an increase in sources of funds to meet these challenges.

D. Section 1983 claims are being presented as class actions where the practices of a municipality for several years past, which have been accepted and unchallenged, are now accumulated in one law suit. Municipalities are faced with tremendous potential liability as a result of efforts to deal with illegally parked cars during blizzard emergency situations where it was imperative to keep streets open for emergency vehicles.

ACT:kd 5/7/81

E. Senate Bill 585 introduced by Senator Hatch proposes to reinstitute the good faith defense of the municipality that was in effect prior to the decision in Owen v. City of Independence, 445 U.S. 622 (1980). Senate Bill 584 would limit Section 1983 to laws providing for equal rights of citizens, so as to counter the effect of the Supreme Court decision in Maine v. Thiboutot, 448 U.S.__________(1980).

SECTION 2: The Village of Oak Park, therefore, supports Senate Bills 584 and 585 and directs the Village Manager to forward a certified copy of this Resolution to the Representatives of the Village in both the House of Representatives and the Senate.

THIS RESOLUTION shall be in full force and effect from and after its adoption and approval as provided by law.

ADOPTED this 18th day of May, 1981, pursuant to a roll call vote as follows:

AYES: Trustees Kier, Korchek, McLean, McMahon, Muriello and Slaughter and President Bode
NAYS: None

APPROVED by me this 18th day of May, 1981.

PRESIDENT

ATTEST:
Virginia R. Cassin
CLERK
by: I. Rosmarie Shaw
I. Rosmarie Shaw
Deputy Village Clerk

City of Clifton
NEW JERSEY

BETTY J. LUTZ
CITY CLERK

CITY HALL
ROOM 212 PHONE 473-2600

June 2, 1981

The Honorable Senator Hatch
Chairman of the Subcommittee on the Constitution
Senate Office Building
Washington, D. C. 20510

Dear Senator Hatch:

Enclosed is a certified copy of a resolution adopted by the Municipal Council of the City of Clifton, New Jersey on June 1, 1981 concerning amendments to the Civil Rights Act. The resolution is self-explanatory.

Your kind consideration of this petition will be sincerely appreciated.

Very truly yours,

Betty J. Lutz
City Clerk

BJL/rs

Enc.

WHEREAS, recent decisions of the United States Supreme Court construing provisions of the Civil Rights Act of 1871 have caused 42 USC Sect. 1983 to become the vehicle for assertion of claims against municipalities in areas having no relationship with traditional civil rights matters while denying municipalities many defenses thereto; and

WHEREAS, the Civil Rights Attorneys' Fees Awards Act of 1976 (42 USC Sect. 1988) provides for a discretionary award of attorneys' fees to prevailing parties in Sec. 1983 cases; and

WHEREAS, several billion dollars in claims under Sec. 1983 are now pending against municipal governments; and

WHEREAS, such claims are not covered by insurance; and

WHEREAS, Sec. 1983 lawsuits have a potentially crippling financial impact upon municipal governments; and

WHEREAS, the Subcommittee of the Senate Judiciary Committee is holding hearings on amendments to Sec. 1983; and

WHEREAS, Senate Bill 584 would limit Sec. 1983 actions solely to actions "providing for equal rights of citizens or of all persons within the United States;" and

WHEREAS, Senate Bill 585 would bar actions against local governments acting in good faith; and

WHEREAS, the National Institute of Municipal Law Officers has proposed statutes limiting the award of attorneys' fees in civil rights actions, limiting Sec. 1983 actions to civil rights violations; and providing a good faith immunity to local governments; and

WHEREAS, Senate Bill 000 would expand local government liability by making local governments strictly liable in Sec. 1983 actions for equitable relief;

NOW, THEREFORE, BE IT RESOLVED that the Municipal Council of the City of Clifton hereby urges the Subcommittee on the Constitution of the Senate Judiciary Committee to support amendments to the Civil Rights Actof 1871 and to the Civil Rights Attorneys' Fees Awards Act of 1976 limiting Sec. 1983 actions to cases of civil rights violations, providing immunity for civil rights cases to local governments acting in good faith, and limiting awards of attorneys' fees in civil rights actions: and

BE IT FURTHER RESOLVED that the Municipal Council urges the Subcommittee on the Constitution to oppose Senate Bill 990 and any other bills excluding defenses afforded local governments in equitable actions: and

BE IT FURTHER RESOLVED that a copy of this resolution be sent to Senator Hatch, Chairman of the Subcommittee on the Constitution, to the United States Senators for the State of New Jersey, to the United States Congressional delegation for New Jersey, and to Passaic County municipalities.

INTRODUCED BY Joseph Grecco

ADOPTED June 1, 1981

Gerald Zecker
MAYOR

ATTEST Betty J. Lutz
CITY CLERK

A True Copy.
City Clerk

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
ANNUAL MEETING
June 24-27, 1981
Jackson Hole, Wyoming

RESOLUTION

42 U.S.C. SECTIONS 1983 AND 1988

WHEREAS, recent decisions of state and federal courts have interpreted and applied the 1871 Civil Rights Act, 42 U.S.C. § 1983, and the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, in such a way as to create serious concern among states and municipalities as to the extent of their liability for damages and attorney's fees; and

WHEREAS, the trend of these decisions has been to expand the financial liability of state and local governments and employees for damages and attorneys fees even in circumstances where the state or municipality has acted in good faith or in furtherance of cooperative federal-state programs enacted by Congress; and

WHEREAS, the criteria for awarding attorney's fees under 42 U.S.C. § 1988 have resulted in awards of attorney's fees that are excessive and that are potentially threatening to the ability of states and municipalities to operate within reasonable budgetary restraints; and

WHEREAS, 42 U.S.C. §§ 1983 and 1988, in their present form, have otherwise created inequities in the assessing of damages and attorney's fees against states and municipalities and their officers and employees; and

WHEREAS, it is recognized that 42 U.S.C. §§ 1983 and 1988 implement important social policies that are intended to protect against the violation of federally created rights by states and municipalities and to ensure access to the courts by all citizens; and

WHEREAS, a reevaluation of 42 U.S.C. §§ 1983 and 1988 is warranted in order to balance the important public interests protected by those Acts against the legitimate interests of state and local governments.

NOW, THEREFORE, BE IT RESOLVED by the National Association of Attorneys General that:

1) the Association expresses its serious concern over the matters set forth above; and

2) the Association urges the Congress to take appropriate steps to amend 42 U.S.C. §§ 1983 and 1988 for the purpose of alleviating the serious fiscal liability that now confronts state and local governmental entities; and

3) the Association supports the passage of S. 584 and S. 585; and

4) the Association commends the Ad Hoc Subcommittee for its work on this matter; and

5) the Association authorizes the General Counsel to transmit this resolution and the Subcommittee report to members of Congress and the Administration.

GEORGIA
MUNICIPAL
ASSOCIATION, INC.
NATIONAL BANK OF GEORGIA BUILDING
SUITE 2300 • 34 PEACHTREE STREET, N.W. • ATLANTA, GEORGIA 30303 • TELEPHONE (404) 688-0472

Mayor Harry Simmons, Jr., *President*
Vienna
Mayor Tom Faircloth, *First Vice President*
Thomasville
Mayor Lillian Webb, *Second Vice President*
Norcross
Mayor Robert Knox, *Third Vice President*
Thomson
W. Elmer George, *Executive Director*
ACTIVE PAST PRESIDENTS
Mayor David Barrow
Immediate Past President
[illegible]
Mayor Lewis A. Newman
Augusta
Mayor Gerald H. Thompson
Fitzgerald
Mayor John P. Rousakis
Savannah
Mayor John C. Barrow
West Point
Mayor Randolph Medlock
Stone Mountain
Mayor W. B. Withers
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FIRST DISTRICT
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Mayor Willard Lanier
Sylvania
First Vice President
Mayor Thurman Lanier
Statesboro
SECOND DISTRICT
President
Mayor Billy E. Reynolds
Bainbridge
First Vice President
Councilwoman Nellie Bell
[illegible]
THIRD DISTRICT
President
Mayor Thomas Persons
Waverly Hall
First Vice President
Mayor Pro Tem Henrietta McIntyre
Warner Robins
FOURTH DISTRICT
President
Charles Walker
Conyers
First Vice President
Councilman Rusty Paul
Stone Mountain
FIFTH DISTRICT
President
Councilman Frank Wilbanks
Roswell
First Vice President
Councilman Ira Jackson
Atlanta
SIXTH DISTRICT
President
Councilman Billy Abraham
[illegible]
First Vice President
Mayor John H. Wynn
Douglasville
SEVENTH DISTRICT
President
Mayor Dana Eastman
Marietta
First Vice President
Commissioner Martin Mitchell
Rome
EIGHTH DISTRICT
President
Commission Chairman Lawrence Bennett
Hawkinsville
First Vice President
Councilman Cliff Pickens
Fitzgerald
NINTH DISTRICT
President
Mayor R. G. Wages
Hartwell
First Vice President
Mayor Pro Tem Bob Hamrick
Gainesville
TENTH DISTRICT
President
Mayor Avery Hardin
Watkinsville
First Vice President
Mayor Frank Sherrill
Social Circle
DIRECTORS AT LARGE
Mayor Herman Ayers
Lavonia
Mayor Duncan Campbell
Lithonia
Councilman Frank Edenfield
Millen
Commissioner Harry Goldstein
Albany
Commissioner Raymond Head
Tifton
Mayor Maynard Jackson
Atlanta
Mayor Pro Tem A. J. McClung
Columbus
City Attorney James Davis
President, City Attorneys Section
Albany
City Manager Al Crace
President, City Managers Section
Rome
City Administrator Bill Leachman
President, City Clerks & Finance Officers
[illegible]
Powder Springs
Mayor Lillian Webb
Chairman, Electric Cities of Georgia
Norcross
Utilities Superintendent Wyman Hughes
Chairman, GMA Gas Section
LaGrange

July 20, 1981

Mr. Charles Rhyne
General Counsel
NIMLO
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D. C. 20036

RE: Amendments to §1983 and §1988

Dear Charles:

Please find enclosed a copy of the Resolution adopted by our cities at our annual Convention last month on the above subject. We hope that you will find this of interest to you as you seek to address these most serious matters before Congress.

Sincerely,

Elmer

W. Elmer George
Executive Director

WEG:ES:dls

Enclosures

cc: Mayor Tom Faircloth

A RESOLUTION

On Amendments to the Civil Rights Act of 1871

WHEREAS, the lack of clear guidance from Congress has encouraged the federal courts to apply the Civil Rights Act in situations and with results not contemplated by the 42nd Congress in 1871; and,

WHEREAS, recent judicial interpretations of the Congressional intent behind the enactment of the Civil Rights Act of 1871 have resulted in excessive federal judicial interference in state and local operations; and,

WHEREAS, in some cities the total amount in Section 1983 claims exceed the city's operating budget; and,

WHEREAS, this new fiscal drain is coming at a time when inflation and tax limitation provisions in statutes and constitutions of the states are restricting the ability of local governments to raise money for any purpose; and,

WHEREAS, the enforcement of legitimate civil rights claims should be protected.

NOW THEREFORE BE IT RESOLVED that the Congress should provide to the state and local government the same immunities as are provided for local government officials.

BE IT FURTHER RESOLVED that Congress should restrict the laws that are enforceable by 42 U.S.C. §1983 to civil rights laws only.

BE IT FURTHER RESOLVED that Congress should restrict the practice of awarding attorney's fees to prevailing plaintiffs who sue under §1983.

MARGE ROUKEMA
7th District, New Jersey

Committee:
BANKING, FINANCE AND URBAN AFFAIRS

Subcommittees:
HOUSING AND COMMUNITY DEVELOPMENT
ECONOMIC STABILIZATION
GENERAL OVERSIGHT AND RENEGOTIATION

Committee:
EDUCATION AND LABOR

Subcommittees:
ELEMENTARY, SECONDARY AND VOCATIONAL EDUCATION
LABOR STANDARDS

Congress of the United States
House of Representatives
Washington, D.C. 20515

Washington Office:
226 Cannon House Office Building
Washington, D.C. 20515
(202) 225-4465

District Office:
10 Forest Avenue
Paramus, New Jersey 07652
(201) [illegible]

July 31, 1981

The Honorable Orrin G. Hatch, Chairman
Subcommittee on the Constitution
3306 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Your Subcommittee has recently held hearings on the extent of municipal liability under 42 U.S.C. 1983 for violations of constitutional and civil rights. Since 1978, when the U.S. Supreme Court held that such liability exists, in Monell v. Department of Social Services, local governments have been exposed to numerous lawsuits based upon section 1983.

I have enclosed a Resolution adopted by the Borough of North Haledon, New Jersey, for your Subcommittee's consideration. The Resolution raises some compelling points, some of which are addressed in your own bills, S. 584 and S. 585, which were prompted by two 1980 U.S. Supreme Court decisions.

In Owen v. City of Independence, the Court held that municipalities could not offer a "good faith" defense in section 1983 cases. In the Owen case, the violation of rights was determined on the basis of a Supreme Court decision in a separate case handed down after the facts in the Owen case took place. The inhibiting factor the Owen case places on local decision making is a substantial one deserving of your Subcommittee's attention.

In a separate case, Maine v. Thiboutot, the Supreme Court held that rights which could be protected under section 1983 included those created by any Federal laws, even if their purpose is not to protect civil rights. It would seem that, where Congress intends for enforcement mechanisms to be available to individuals under a particular law, it will include such mechanisms in the legislation, as is usually the case.

Finally, there has been significant concern among municipalities as to the availability of attorneys' fees being awarded to prevailing plaintiffs under section 1983. This often has the effect of encouraging cases, which might not otherwise be brought, on the eventuality that the municipality will settle the case out of court. As the awarding of attorneys' fees is a matter

THIS STATIONERY PRINTED ON PAPER MADE WITH RECYCLED FIBERS

The Honorable Orrin G. Hatch
July 31, 1981
page two

within the discretion of the presiding judge, reasonable limitations on that discretion are certainly worth exploring.

The issues raised by the Monell case are difficult ones. It is indeed important that an appropriate balance be struck between the constitutional and civil rights of those with grievances against municipalities and the legitimate interest of the local taxpayer in having as much of the local budget as possible expended for needed services. In light of the fact that the cases discussed are based entirely upon statutory law, it is important that the Congress examine these issues closely. I am encouraged by the fact that your Subcommittee has turned its attention to this matter.

I respectfully request that the enclosed resolution be included in the record of the proceedings of July 23, 1981. I appreciate your attention in this matter.

Sincerely,

Marge Roukema

Marge Roukema
Member of Congress

MSR:Dy
Enclosure

BOROUGH OF NORTH HALEDON

RESOLUTION

WHEREAS, recent decisions of the United States Supreme Court construing provisions of the Civil Rights Act of 1871 have caused 42 USC Sect. 1983 to become the vehicle for assertion of claims against municipalities in areas having no relationship with traditional civil rights matters while denying municipalities many defenses thereto; and

WHEREAS, the Civil Rights Attorneys' Fees Awards Act of 1976 (42 USC Sect. 1988) provides for a discretionary award of attorneys' fees to prevailing parties in Sec. 1983 cases; and

WHEREAS, several billion dollars in claims under Sec. 1983 are now pending against municipal governments; and

WHEREAS, such claims are not covered by insurance; and

WHEREAS, Sec. 1983 lawsuits have a potentially crippling financial impact upon municipal governments; and

WHEREAS, the Subcomittee of the Senate Judiciary Committee is holding hearings on amendments to Sec. 1983; and

WHEREAS, Senate Bill 584 would limit Sec. 1983 actions solely to actions "providing for equal rights of citizens or of all persons within the United States;" and

WHEREAS, Senate Bill 585 would bar actions against local governments acting in good faith; and

WHEREAS, the National Institute of Municipal Law Officers has proposed statutes limiting the award of attorneys' fees in civil rights actions, limiting Sec. 1983 actions to civil rights violations; and providing a good faith immunity to local governments; and

WHEREAS, Senate Bill 990 would expand local government liability by making governments strictly liable in Sec. 1983 actions for equitable relief;

NOW, THEREFORE, BE IT RESOLVED that the Board of Council of the Borough of North Haledon hereby urges the Subcommittee on the Constitution of the Senate Judiciary Committee to support amendments to the Civil Rights Act of 1871 and to the Civil Rights Attorneys' Fees Awards Act of 1976 limiting Sec. 1983 actions to cases of civil rights violations, providing immunity for civil rights cases to local governments acting in good faith, and limiting awards of attorneys' fees in civil rights actions; and

BE IT FURTHER RESOLVED that the Board of Council urges the Subcommittee on the Constitution to oppose Senate Bill 990 and any other bills excluding defenses afforded local governments in equitable actions; and

#163-1981

BE IT FURTHER RESOLVED that a copy of this resolution be sent to Senator Hatch, Chairman of the Subcommittee on the Constitution, to the United States Senators for the State of New Jersey, to the United States Congressional delegation for New Jersey, and to Passaic County municipalities.

Harold V. Peters
Harold V. Peters
Mayor

Duly adopted on this
8th day of July, 1981

Lucille B. Debiak
Borough Clerk

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO
JOHN W. WITT
CITY ATTORNEY

ROBERT S. TEAZE
ASSISTANT CITY ATTORNEY
CURTIS M. FITZPATRICK
SENIOR CHIEF DEPUTY CITY ATTORNEY

CITY ADMINISTRATION BUILDING
SAN DIEGO, CALIFORNIA 92101
(714) 236-6220

August 4, 1981

Mr. Charles S. Rhyne
General Counsel
NIMLO
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

Dear Charlie:

Here is a copy of the resolution passed today by our City Council supporting the amendments to 42 U.S.C., §§ 1983 and 1988, proposed by our committee chaired by Roy Bates. The committee is authorized to express the support of The City of San Diego for the proposed amendments.

Sincerely yours,

JOHN W. WITT
City Attorney

JWW:c
cc: Roy D. Bates
Encl.

DRAFT

RESOLUTION No. ________________________ (R-________)

Adopted on ________________

BE IT RESOLVED, by the Council of The City of San Diego as follows:

WHEREAS, the 1,600 local governments which are members of the National Institute of Municipal Law Officers (NIMLO) and which participate in the work of NIMLO through their chief legal officers are concerned that the Civil Rights Act of 1871 as construed in recent decisions by the Supreme Court of the United States will adversely affect all local governments in ways which were not brought to the attention of the Court in recent cases and which are only now becoming apparent;

WHEREAS, NIMLO in surveying its members has determined that claims under the Civil Rights Act, 42 U.S.C. § 1983, now pending, amount to $4.8 billion for 215 local governments, in some cases the civil rights claims exceeding the operating budgets of smaller municipalities;

WHEREAS, a conservative estimate by the City Attorney's office reveals that there are $1.5 million in civil rights claims now pending against The City of San Diego;

WHEREAS, the easy availability of attorneys' fees in § 1983 cases encourages the filing of frivolous claims of this magnitude;

WHEREAS, excessive judicial intrusion caused by the strict liability concepts in recent Supreme Court civil

civil rights decisions compounded by attorney fee availability will distort municipal decisionmaking and restrict the independence of local governments and their ability to respond to community needs;

WHEREAS, it is important that legitimate relief from unconstitutional activities by government at all levels be available to all;

WHEREAS, a special NIMLO committee of municipal attorneys has considered the problem and has recommended a legislative solution, as attached as Appendix A of this Resolution;

NOW, THEREFORE, BE IT RESOLVED, that the City Council of The City of San Diego urges the Committees on the Judiciary of the House and the Senate to give early and careful consideration to amendments to Sections 1983 and 1988 of Title 42 of the U. S. Code as proposed in Appendix A of this Resolution and further urges the Committees to consider data illustrative of the civil rights litigation problem now facing local governments, which data has been supplied to the Committees by way of the special NIMLO committee's report and testimony offered by resprsentatives of the special committee at Congressional hearings on the subject.

BE IT FURTHER RESOLVED, that the City Department of Intergovernmental Relations is instructed to inform the

Congress of the United States of the City's position on the matter.

APPROVED: JOHN W. WITT, City Attorney

By ____________________

JWW:c:580,046,(043.1)

Or. Dept.: Attorney
Appendix A

RESOLUTION

A RESOLUTION URGING SENATE SUBCOMMITTEE TO AMEND SECTION 1983 OF THE 1871 CIVIL RIGHTS LAW TO PROTECT LOCAL OFFICIALS FROM PUNITIVE DAMAGES ARISING FROM OFFICIAL ACTIONS TAKEN IN GOOD FAITH.

WHEREAS, in recent years, broad court interpretations have greatly expanded the liability of Municipal Offials and Governments under Section 1983; and

WHEREAS, the law permits a person whose Constitutional Rights are violated as a result of officially sanctioned actions by a Government or its Officials to recover damages or to obtain injunctive or declaratory relief; and

WHEREAS, the National League of Cities has proposed amending Section 1983 to give greater protection to City Officials, to limit monetary damages from Municipal Governments to cases in which the Plaintiffs can prove the official policy is unconstitutional and not taken in good faith; and to make the primary purpose of Section 1983 the protection of Civil and Constitutional Rights, allowing prospective relief, such as injunctions or declaratory judgments.

NOW, THEREFORE, BE IT RESOLVED that the Suncoast League of Municipalities does hereby declare full support of the National League of Cities proposal for amendments to Section 1983,

BE IT FURTHER RESOLVED that copies of this Resolution be forwarded to the following members of the Senate Subcommittee:

The Honorable Orrin G. Hatch - Chairman
The Honorable Strom Thurmond
The Honorable Charles E. Grassley
The Honorable Dennis DeConcini
The Honorable Patrick J. Leahy

THIS RESOLUTION adopted by the Suncoast League of Municipalities at a Regular meeting held in St. Petersburg, Florido, on this 8th day of August, 1981.

Lawrence Puckett
Lawrence Puckett
President

Attest:
Ethel M. Insco
Ethel M. Insco
Secretary-Treasurer

Town of Pembroke Park

GERALD J. YOURMAN
Mayor
JAMES CROCCO
Vice Mayor
A.J. RYAN, JR.
Attorney

3150 S.W. 52nd AVENUE
PEMBROKE PARK, FLORIDA 33023
BROWARD: 966-4600 • MIAMI: 624-1969

BENJAMIN M. LINET
Commissioner
HELEN LOFLAND
Commissioner
NELSON KRAMER
Commissioner

August 12, 1981

Senator Orrin G. Hatch
Subcommittee on the Constitution
Senate Office Building
Washington, D.C. 02501

Dear Senator Hatch,

As elected officials we all have a stake in seeing that "Section 1983" be amended to protect local officials from punitive damages arising from official actions taken in good faith.

As you know this law permits a person whose consitutional rights have been violated as a result of officially sanctioned actions by a government or its officials to recover damages or to obtain injunctive or declaratory relief. In short, it allows us to be sued for doing what we feel is necessary and in acting in good faith.

Since this amendment is vital to the function of governments, I am asking you to please exercise what ever power you may have and notify the members of the subcommitee on the Constitution to support the proposal for amendment to Section 1983.

This section should be ammended to give greater protections to city officials; to limit monetary damages from municipal governments to cases in which the plaintiffs can prove the official policy is unconstitutional and not taken in good faith; and to make the primary purpose of Section 1983 the protection of civil and constitutional rights, allowing prospective relief, such as injunctions or declaratory judgments. I cannot implore you enough to back the amendments to Section 1983. I am sure you realize their importance to good government.

Thank you for your prompt attention to this matter, I remain,

Sincerely,

Gerald J. Yourman
Mayor

GJY/sek

AMERICAN PUBLIC POWER ASSOCIATION
2600 VIRGINIA AVENUE NW WASHINGTON DC 20037 · 202/342-7200

September 10, 1981

Honorable Orrin G. Hatch
Chairman, Senate Subcommittee
on the Constitution
125-B Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

The American Public Power Association is concerned with the increasing legal liability that municipal governments, including local publicly owned electric utilities, are being exposed to because of litigation brought under the Civil Rights Act of 1871. APPA, therefore, supports the legislative changes you are proposing in S. 584 and S. 585 that would reduce the scope of this liability. APPA is the national service organization representing over 1,750 local publicly owned electric utilities in 48 states, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

The recent experience of the Chattanooga, Tennessee Electric Power Board illustrates the wide range of lawsuits that may be brought under 42 U.S.C. §1983. In one action, the plaintiff alleged that the Board's termination of his electrical service for nonpayment of a utility bill was a violation of "his rights to equal protection and due process...." The plaintiff supported his claim by relying on Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1 (1978). The Supreme Court held in Craft that utility service was a property interest subject to constitutional protection and, therefore, such service could not be terminated without procedural due process (ie., adequate notice of termination and an opportunity to discuss the dispute with a person having the authority to resolve it). The plaintiff demanded $50,000 in actual damages and $10,000 in punitive damages, and requested costs.

A federal district court judge rejected the plaintiff's claim. The judge found that the plaintiff had purportedly leased his home to another person to avoid being denied electrical service for not paying a previous utility bill. The judge called the lease a "ruse and subterfuge" and said the Board had lawfully discontinued service. Although the Board recovered the utility charges and court costs, it was denied reimbursement for the appreciable attorneys fees it had incurred. The U.S. Court of Appeals for the Sixth Circuit later dismissed the plaintiff's appeal.

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Harlan, Iowa
WILLIAM C. WALBRIDGE
Sacramento Municipal Utility District
Sacramento, California
ROBERT C. YOUNG
Burlington, Vermont

The Electric Power Board also is currently involved in lawsuits concerning termination of service to certain trailer parks. In both actions, the city of Chattanooga found that electrical wiring in certain units in both parks violated the electrical code. Under applicable law in Tennessee, the Board is required to terminate service when such violations are found. The plaintiffs charge that the city arbitrarily singled out their units for inspection in "violation of their Civil Rights." The plaintiffs further allege that the city and the Board are trying to eliminate trailer parks within the city, in violation of their right to due process. Together, they have requested $2.25 million in compensatory damages and $2.2 million in punitive damages, plus attorneys fees. An attorney for the Board indicated they may move for summary judgment on both cases, especially on the issue of punitive damages. The Supreme Court recently held in City of Newport v. Fact Concerts, 49 U.S.L.W. 4860 (1981), that municipalities were not liable for punitive damages under Section 1983.

The authors of Civil Rights Act of 1871 intended to give citizens legal recourse against government deprivations of constitutional rights. In the first case cited above, however, the plaintiff turned a clearly frivolous claim into a violation of his civil rights and then brought suit under Section 1983. As for the latter two cases, the Board appears to have been acting in conformance with applicable Tennessee law when it terminated service. Nevertheless, the utility has again been exposed to substantial financial liability, especially if one or both of the plaintiffs prevail. On the other hand, even if the plaintiffs lose, the utility will have to pay attorneys fees that it probably will not recover. The costs of defending each of these suits ultimately will have to be borne by the utility's ratepayers.

The potential liability of a municipally owned utility, like any other city agency, is not limited by Section 1983 to these types of cases. For example, a utility could be involved in any form of personnel action such as hirings,promotions, or dismissals, and persons aggrieved by such procedures could bring suit alleging denial of their constitutional rights. Also, under the broad interpretation of civil rights given by the Supreme Court in Maine v. Thiboutot, 48 U.S.L.W. 4861 (1981), a utility could be held in violation of Section 1983 by improperly administering a federally mandated program. Federally mandated programs for public power systems could include, for example, establishing conservation programs under the National Energy Conservation Policy Act, or dealing with cogenerators of small power producers under section 210 of the Public Utility Regulatory Policies Act as administered by the Federal Energy Regulatory Commission.

APPA believes that municipalities and publicly owned electric utilities should be held accountable for government policies and official actions that result in a deprivation of constitutional rights.

At the same time, however, they should not be subjected to defending claims that have little or no relationship to any constitutional rights, nor should they be left without adequate legal defenses. Moreover, municipalities and their utilities should have the opportunity to recover attorneys fees when they prevail in Section 1983 litigation. Without these protections, city officials and utility managers will be inhibited in how they develop and implement government policies for fear of exposing the city to legal liability and costing taxpayers and ratepayers substantial sums of money.

For these reasons, APPA endorses the legislative objectives of S. 584 and S. 585. APPA also endorses the amendment to S. 585 suggested by the National Institute of Municipal Law Officers (NIMLO); that is, allowing municipalities to take derivatively any legal defenses that are available to its officials. In addition, APPA supports the recommendations made by NIMLO to modify the award of attorneys fees under 42 U.S.C. §1988, including:

a) requiring plaintiffs to show a causal connection between his action and any subsequent change in government policy;

b) limiting plaintiff's recovery of attorneys fees to time spent on the issue on which he prevailed;

c) placing a ceiling on fees to 1/2 of the damages recovered;

d) disallowing the use of "multipliers";

e) prohibiting awards of fees incurred for litigating the original fee award; and

f) allowing government defendants to recover attorneys fees when they prevail in Section 1983 litigation.

S. 584 and S. 585, together with these legislative amendments, will restore the balance between protecting citizens's constitutional rights, and enabling municipalities and publicly owned electric utilities to discharge their duties without being subject to unnecessary litigation.

APPA would request that this letter be included in the hearing record.

Thank you for this opportunity to present our views on this matter.

Sincerely,

Alan H. Richardson

Alan Richardson
Legislative Director

AHR:TMH:lb

RESOLUTION (312-81)

TO: Honorable Members of the La Crosse County Board of Supervisors

RE: Urging Support of Bill S.585, 97th Congress, Which Would Provide Municipalities and Counties with Defenses to Civil Rights Lawsuits Under 42 U.S.C. 1983

WHEREAS, the County of Eau Claire having gone on record in support of Senate Bill 585, 97th Congress, and;

WHEREAS, it would appear to be in the best interest of La Crosse County and other counties to support passage of S.585, a copy of which is attached.

NOW, THEREFORE, BE IT RESOLVED, that the La Crosse County Board does hereby go on record in support of the Resolution as adopted by the Eau Claire County Board of Supervisors in support of the legislation as cited, and;

BE IT FURTHER RESOLVED, that a copy of this Resolution be submitted to the Wisconsin County Boards Association, the National Association of Counties, U.S. Senator Oren Hatch, Senators William Proxmire and Robert Kasten, and to the County Clerks of each county.

Dated this 10th Day of September , 1981, at La Crosse, Wisconsin.

FINANCE & PERSONNEL COMMITTEE

Gordon Feinberg

Herrmann

Alec Berg

Adopted by the County Board this 17th Day of September, 1981.

STATE OF WISCONSIN)
COUNTY OF LA CROSSE) SS

I, Russell L. Fiedler, County Clerk of La Crosse County, do hereby certify that the attached resolution is a true and correct copy of the original resolution required by law to be in my custody and which was adopted by the County Board of Supervisors of La Crosse County at a meeting held on the 17th day of September, 1981

Russell L. Fiedler

Russell L. Fiedler

Washington Office

September 17, 1981

The Honorable Orrin G. Hatch
Chairman, Senate Subcommittee
on the Constitution
108 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

By two decisions in the past 18 months, the Supreme Court has called attention to flaws in the 1871 Civil Rights Act (42 U.S.C. 1983). Your bills, S. 584 and S. 585, would, in the judgment of the Alameda County (California) Board of Supervisors, both clarify and restore the original intent of 42 U.S.C. 1983. These improvements are of importance to all of us and are urgently needed.

Accordingly, the Board has taken a formal position in support of S. 584 and S. 585 by the enclosed resolution. They urge you to report these bills to the full committee at the earliest appropriate time and look to your active support for their enactment.

Sincerely,

Kenneth W. Wade
Kenneth W. Wade
Washington Representative

Enclosure
KWW/cjm

1735 New York Avenue • Suite 503 • Washington, D.C. 20006 • (202) 785-0414

September 1, 1981
Approved as to Form
RICHARD J. MOORE, County Counsel

REEL__________ IMAGE__________

By...Deputy

THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA, STATE OF CALIFORNIA

On motion of Supervisor Cooper, Seconded by Supervisor Excell,
and approved by the following vote,
Ayes: Supervisors Cooper, Excell, Santana and Chairman Bort - 4
Noes: Supervisors None
Excused or Absent: Supervisors None
Abstained: Supervisor George - 1
THE FOLLOWING RESOLUTION WAS ADOPTED: NUMBER 1 9 1 5 5 2

SUPPORT LEGISLATION - S.584 AND S.585

BE IT RESOLVED that the Board of Supervisors of the County of Alameda, State of California, does hereby go on record in support of S.584 and S.585 (Hatch), relating to the 1871 Civil Rights Act (42 U.S.C. 1983); and

BE IT FURTHER RESOLVED that the Alameda County Legislative Advocate in Washington, D.C. be and he is hereby authorized and directed to actively work for the passage of S.584 and S.585.

I CERTIFY THAT THE FOREGOING IS A CORRECT COPY OF A RESOLUTION ADOPTED BY THE BOARD OF SUPERVISORS ALAMEDA COUNTY, CALIFORNIA SEP - 1 1981
ATTEST. SEP - 1 1981
WILLIAM MEHRWEIN, CLERK OF THE BOARD OF SUPERVISORS
BY Chapman

COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX
BOARD OF SUPERVISORS
FAIRFAX, VIRGINIA 22030

JOHN F. HERRITY
CHAIRMAN
4100 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030

TELEPHONE 691-2321

September 30, 1981

Pete

Senator Orrin G. Hatch
Room 411
Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

I am writing on behalf of the Fairfax County Board of Supervisors in support of your legislation to limit the liability imposed on public officials by 42 U.S.C. §1983. These bills, S. 584 and S. 585, would properly limit liability to a reasonable level while continuing individual civil rights.

Sincerely,

Jack

John F. Herrity
Chairman
Fairfax County Board of Supervisors

cc: Board of Supervisors
cc: County Attorney